Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. EDWARD TOTTEN,

Petitioner,

v.

BOMBARDIER CORPORATION AND ENVIROVAC, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the False Claims Act, 31 U.S.C. § 3729 *et seq.*, applies to federal monies given by Congress to Amtrak, a grantee, that pays a contractor for goods and services with these federal monies; and whether the complaint in this case establishes a cause of action under the language of 31 U.S.C. §§ 3729(a)(1), (a)(2) and (c).

31 U.S.C. § 3729 (a) (1) of the False Claims Act ("FCA") provides "[a]ny person who knowingly presents, or causes to be presented, to an officer or employee of the United States . . . a false or fraudulent claim for payment or approval; is liable to the United States Government for a civil penalty . . ." 31 U.S.C. § 3729 (c) defines claim to include

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

The U.S. Court of Appeals for the District of Columbia Circuit has interpreted 31 U.S.C. §§ 3729(a)(1) and (c) in a manner inconsistent with Congressional intent and decisions of federal circuits and the Supreme Court by holding that the fraudulent demand for payment must be presented to an officer or employee of the Federal Government, and not a grantee, in order for the False Claims Act to apply. *United States ex rel. Totten v. Bombardier Corp. et al.*, 380 F.3d 488, 363 U.S. App. D.C. 180 (D.C. Cir. 2004) *(Totten II).*

In *United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), a district court has relied on the *Totten II* decision and held that Medicaid claims submitted to a state entity for reimbursement from federal funds are not actionable under the federal False Claims Act. Consequently, hundreds of billions of dollars in federal funds that are given to grantees are in jeopardy.

LIST OF PARTIES TO PROCEEDING

The petitioner is Edward L. Totten, proceeding on behalf of himself and on behalf of the United States of America.

The United States of America is not a party to this matter although the United States of America filed an *amicus curiae* brief in the United States Court of Appeals for the District of Columbia Circuit in support of Totten.

The appellees are Bombardier Corporation and Envirovac, Inc.

CORPORATE DISCLOSURE STATEMENT

Bombardier Corporation

Bombardier Corporation is a corporation organized under the laws of Idaho. Bombardier Corporation is 100% owned by Bombardier Holdings (USA) Inc., a Delaware corporation. The latter company, in turn, is 100% owned by Bombardier, Inc., which is incorporated under the federal laws of Canada. Bombardier, Inc. is publicly traded on the Toronto, Brussels and Frankfurt stock exchanges.

Envirovac

Envirovac provides advanced vacuum waste systems for aviation, commercial, marine, supermarket and train applications. Envirovac is a wholly-owned subsidiary of EVAC International Ltd., a Finland corporation. EVAC International Ltd. is a wholly-owned subsidiary of Sanitec Corporation (aka Sanitec Oy), also a Finland corporation.

In turn, Sanitec Oy is owned by Sanitec International, S.A., a Luxembourg corporation; Sanitec International, S.A., is owned by Sanitec International, A.G., a German corporation; and Sanitec International, A.G., is owned by Pool Acquisition, S.A., a Luxembourg corporation.

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Edward L. Totten, proceeding on behalf of himself and the United States of America, respectfully petitions for a writ of *certiorari* to review the *en banc* judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The December 8, 2004 Order of the United States Court of Appeals for the District of Columbia Circuit denying rehearing *en banc* is reported at *United States of America, ex rel Edward L. Totten v. Bombardier Corporation and Envirovac, Inc.*, 380 F.3d 488, 363 U.S. App. D.C. 180 (D.C. Cir. December 8, 2004) and is reproduced at App. C, page 63a. The August 27, 2004 decision of the United States Court of Appeals affirming the decision of the District Court's dismissal of the petitioner's case is reported at the same citation and is reproduced here at App. A, page 1a.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment on August 27, 2004 and denied rehearing *en banc* on December 8, 2004. The jurisdiction of the District of Columbia Circuit was based on 29 U.S.C. § 1331 and the False Claims Act, 31 U.S.C. § 3729, *et seq.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(a) and Supreme Court Rule 10(c) that the United States Court of Appeals for the District of Columbia Circuit has decided an important federal question in conflict with the relevant decisions of this Court and Congressional intent.

RELEVANT PROVISIONS

Title 31 U.S.C. § 3729(a) provides:

> **Liability for certain acts.** – Any person who–
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; is liable to the United States for a civil penalty of not less that $5,500 and not more than $11,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, . . .
>
> **(c) Claim defined.** – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.[1]

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1. A copy of the entire False Claims Act is attached hereto at Appendix D.

STATEMENT OF THE CASE

This matter arises out of the $340 million contract between Amtrak and Bombardier/Envirovac to purchase passenger rail cars. Mr. Totten alleged that Bombardier/ Envirovac knowingly built defective train cars and delivered them to Amtrak. Mr. Totten further alleged that Amtrak was a grantee of the United States of America and used federal funds to repay the principal and interest on the loan which financed the purchase of the train cars from Bombardier/ Envirovac making the False Claims Act applicable to this transaction.

REASONS FOR GRANTING THE WRIT

1. Before Totten II, Courts indicated support for a broad reading of the False Claims Act that included claims presented to a grantee such as Amtrak.

From reading the majority opinion in *U.S. ex rel. Totten v. Bombardier*, 380 F.3d 488, 363 U.S. App. D.C. 180 (D.C. Cir. 2004), one might conclude that the U.S. Court of Appeals for the District of Columbia Circuit was the first to explain or define "knowingly presents, or causes to be presented, to an officer or employee of the United States . . . a false or fraudulent claim for payment or approval" or similar provisions in the False Claims Act. Nowhere in that Opinion is there reference to the decisions of other courts interpreting the very similar language contained in the earlier version of the statute. This is a fatal flaw because the Supreme Court interpreted the predecessor to Section (a)(1) broadly to include claims presented to grantees and intermediaries. Moreover, Congress acknowledged this broad interpretation with approval at the time that it amended the statute in 1986.

Consequently, as the Supreme Court has stated, "In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language and made it part of the enactment.'" *Shapiro v. United States*, 385 U.S. 1, 16 (1948).[2]

The Supreme Court in *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), interpreting the predecessor of Section 3729(a)(1), endorsed a broad reading of presentment that applied the FCA to claims that were not presented to the United States Government.[3] There Mr. Marcus, acting on behalf of the United States, alleged that contractors rigged the bidding process for public projects in the Pittsburgh area. The contracts at issue were between the contractors and the local governments. (*Id*). *The United States was not a party*

2. *See also Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) ("So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *In re North*, 50 F.3d 42, 45 (D.C. Cir. 1995) ("It is settled law that when a statute has an authoritative interpretation, and Congress reenacts it without change, 'Congress is presumed to be aware of [the] interpretation . . . and to adopt that interpretation . . ."); *Dart v. United States*, 848 F.2d 217, 229 (D.C. Cir. 1988), citing Lorillard, "Congress is presumed to be aware of an administrative or judicial interpretation of the statute . . ."; *United States v. Fed. Maritime Comm'n*, 694 F.2d 793, 809 (D.C. Cir. 1982), ("we presume Congress was aware of interpretations that recognized the Department's independent role -- both as a co-respondent and as a petitioner -- under the scheme of review created by the Urgent Deficiencies Act. We further conclude that Congress adopted those interpretations by carrying forward relevant prior law into the Hobbs Act.")

3. Before 1982, sections (a)(1) and (a)(2) were combined as two distinct clauses of the same provision. *See* 31 U.S.C. § 231. (1976 ed.)

to the contracts. (Emphasis added) However, the Federal Government provided substantial funds to finance the local projects and monitored the projects. (*Id.* at page 539, 543). The checks to pay the contractors were drawn on accounts in the name of the local governments. (*Id.*)

The contractor convinced the Third Circuit that the FCA did not reach its conduct because no claims were actually presented to the Government and the payments were generated from local accounts. The Third Circuit reasoned:

> To the word "claim" has been attributed several legal meanings. It is used as an equivalent for "cause of action", "debt", "demand", "existing right" and "unadjudicated obligation". Through them all however runs the sense of something owing from one party to another. The statement of the facts upon which that obligation is asserted to depend may of course be false, but if true would spell out something like an action of assumpsit or debt. It is something quite different to rely on facts which never could give rise to a promise, express or implied, to pay however amply they demonstrate a cheat. . . . The plaintiff seeks to come within the statutory words by stressing the fact that the periodical estimates for partial and final payment were presented to an officer of the PWA. This fact does not surmount the requirement that the claim must be one "against the United States Government or a department or officer thereof." The question is not merely to whom is something presented, it is also what is presented. A claim against the United States means "a right to demand money from the United States."

> The defendants at no time had such a right. The defendants' contracts were exclusively with the local municipalities. Neither the United States of America nor any of its departments, officers or agencies was a party to said contracts. No promise was made by the United States Government nor any department or officer thereof to pay the defendants for their work. Nor was any specific fund prescribed by the defendants' contracts for their payment. Since the local municipalities were the only parties who promised to pay the defendants, the defendants could look solely to this source for payment. Where the local municipalities obtained the funds to pay the contractors was immaterial as between local municipalities and the defendants. The claims of the defendants then were simply against the local municipalities. Since the defendants had no claim upon or against the United States, this action was not authorized by the informer status.

United States ex rel. Marcus, et al. v. Hess, et al., 127 F.2d 233, 236-37 (3d Cir. 1942).

A majority of the U.S. Court of Appeals for the District of Columbia Circuit saw the presentation of a claim to the government as a plain, statutorily indispensable basis for FCA liability:

> Indeed, Totten and the United States never connect the dots in their argument based on subsection (c). Whatever that argument may show about what constitutes a "claim," it does not respond to the plain requirement of subsection (a)(1) that, to be

> actionable under the False Claims Act, any such claim must be presented to an officer or employee of the United States Government. As Judge Randolph noted in *Totten I*, it is clear on the face of the statute that "no matter how 'claim' is defined, subsection (a)(1) requires the alleged false claimant to present it (or cause it to be presented) to a federal officer or employee." 286 F.3d at 554 (Randolph, J., concurring). *Totten II*, *supra*, at 493.

Yet in *Hess*, the Supreme Court found FCA liability where there was no presentation of a claim. As the Third Circuit makes clear, the presentation of estimates to the Public Works Administration never amounted to the presentation of a "claim" under any definition of that word. It is thus misleading for the majority in *U.S. ex rel. Totten v. Bombardier*, *supra*, to stress the forwarding of the estimates for approval by the PWA (*Totten II*, *supra*, at 502) because that presentation had no (a)(1) significance whatsoever. The Supreme Court found FCA liability in *Hess* because a federal grantee had been defrauded of government funds, and the intent of the legislature was to recover every purloined penny:

> Government money is as truly expended whether the checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. . . .These funds are as much in need of protection from false claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. . . . *The fraud here could not have been any more an effort to cheat the United States if there had been no state intermediary.* *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943). [Emphasis Added]

The Supreme Court, at page 542, indicates that the conduct of the contractors in *Hess* violated the provision stating "every person who . . . causes to be presented for payment . . . any claim upon or against the Government of the United States . . . knowing such claim to be fraudulent." This demonstrates that the Court defined "presented for payment . . . any claim upon the or against the Government of the United States" to encompass claims presented to intermediaries and paid out of accounts partially funded by federal dollars. This supports Totten's position that Section 3729 (a)(1) was violated by Bombardier and Envirovac in the case at bar, *i.e.*, that a claim presented to an intermediary, and/or grantee, like Amtrak, is effectively a claim presented to the government.

The First Circuit addressed whether presentation to a grantee invokes the FCA in *Murray & Sorrenson v. United States*, 207 F.2d 119 (1st Cir. 1953).[4] Assessing whether a claim presented to a contractor would support liability under the False Claims Act, the court concluded that it did: "The fact that claims in this case were not presented directly to the government, but were made to it indirectly through the contractors, does not prevent recovery under the False Claims Statute." *Id.* at page 123.

The Third Circuit, in a *per curiam* decision, *United States v. Lagerbusch*, 361 F.2d 449 (3d Cir. 1966),[5] rejected the argument that the FCA did not control where false claims were made to a private corporation that made the payments.

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4. Cited with approval in the legislative history to the 1986 Amendment. *See* A&P S. Rep. 99-345 at page 8.

5. Cited with approval in the legislative history to the 1986 Amendment. *See* A&P S. Rep. 99-345 at page 8.

The court noted that the private corporation was reimbursed by the United States for all of the monies that it expended in connection with a government contract, including the fraudulently obtained sums. *Id.* at page 449.

Accordingly, at the time of the 1982 and 1986 Amendments, the presentation clause had been held to apply the FCA to intermediaries and grantees.[6] It is presumed as a matter of statutory construction that Congress was aware of this judicial construction. *See Shapiro*. However, here this presumption can be verified by specific references in the legislative history where Congress approvingly acknowledged this interpretation. *See* footnotes 4 and 5, *supra*. The majority opinion in the instant case departs markedly from this and must be reversed.[7]

2. As a mixed government corporation under 31 U.S.C. § 9101, Amtrak was the Government.

The majority of the panel in *U.S. ex rel Totten v. Bombardier*, *supra*, cites Amtrak's Section 541 of the enabling statute that declares that Amtrak is not an agency or instrumentality of the United States Government and then concludes that a claim presented to Amtrak is not a claim presented to the United States. If Section 541 were the only Congressional expression of the status of Amtrak, this might

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6. Congress specifically disavowed court opinions that restricted the FCA from covering fraud claims that were not presented to Government. Rep. 99-345 1986 U.S.C.C.A.N. 5266, Page 22.

7. The U.S. Court of Appeals for the District of Columbia's decision in *Totten II*, *supra*, is the only decision since the 1982 and 1986 Amendments to the FCA to restrict the application of the FCA where the fraud claim was presented to a grantee.

end the inquiry. However, as argued in Totten's Brief, Congress had placed Amtrak on the list of mixed ownership government corporations until December 1997. 31 U.S.C § 9101. How could Amtrak appear on this list and not be the United States Government for purposes of 31 U.S.C. § 3729(a)(1)?

The D.C. Circuit answered this question by referring to *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) and quoting the passage stating that Section 541 is "assuredly dispositive of Amtrak's status as a Government entity for purposes that are within Congress's control." *Totten II*, *supra*, at 492. But, the majority opinion does not complete the quotation. The full quotation is

> Section 541 is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control - for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities such as the Administrative Procedure Act, . . . the Federal Advisory Committee Act, . . . and the laws governing Government Procurement.

(Statutory citations omitted). *Lebron* at page 392. In context, this statement by the *Lebron* Court recognizes the authority of Congress to define the status of Amtrak in statutory matters. *Lebron* suggests that Congress has the authority to apply these laws to Amtrak if Congress so desires. *Lebron* does not, as inferred by the majority, resolve the question of Amtrak's status in this case. Congress pursuant to *Lebron* apparently has the power to decide when Amtrak will be

treated like the Government and when it will be treated like a corporation in statutory matters. *Id.*[8]

As indicated above, at Section 541 of Rail Passenger Service Act of 1970, Congress declared that Amtrak was not an agency or instrumentality of the United States Government. However, in the same legislative act, pursuant to Section 804, Congress added Amtrak to the list of Mixed Ownership Government Corporations. Public Law 91-518, Section 804 (October 30, 1970). This change was achieved under a section of the Rail Passenger Service Act of 1970 entitled "Accountability." It amended Section 201 of the Government Corporation Control Act (formerly 31 U.S.C. § 856) to add the National Passenger Railroad Corporation as a Mixed Ownership Government Corporation.

By giving effect to Section 541 over Section 804, the D.C. Circuit ignored a Congressional mandate worthy of greater weight. Neither Section 541 nor the *Lebron* passage cited by the majority indicates a Congressional desire to

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8. *Lebron* never mentions 31 U.S.C. § 9101 in its analysis. However, Congress has treated Amtrak like a government entity on several occasions: (1) Congress created the Office of Inspector General for Amtrak because Congress considered Amtrak to be a "federal entity." 5 U.S.C. App. 3, Section 8E(a)(2); (2) Congress made Amtrak subject to the Freedom of Information Act, 5 U.S.C. Section 552 because of "the substantial federal funds which are going to Amtrak." S. Rep. No. 756, 92nd Congress, 2nd Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 6267, 6274; (3) Congress gave Amtrak intergovernmental immunity making it exempt from state and local taxes and fees. 49 U.S.C. § 24301 (1) and *See United States v. Mexico*, 455 U.S. 720, 735 (1982) (immunity for Amtrak appropriate when "an agency or instrumentality is so closely connected to the government that the two cannot realistically be viewed as separate entities.")

exclude Amtrak, the recipient of billions of dollars of federal funds, from the protection of the False Claims Act. Neither Section 541 nor the cited *Lebron* passage manifests a Congressional intent to treat Amtrak like a private corporation and not as part of the Government for purposes of the False Claims Act. But, by making Amtrak a Mixed Government Corporation pursuant to Section 804, Congress expressed a clear intent for Amtrak to be treated like the Government for purposes of "Accountability."

The Government Corporation Control Act was originally passed in 1945 "to bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof." Public Law 248, Chapter 557, Section 2 (December, 1945). To accomplish this end, the law required the Comptroller General to conduct annual audits of Government Corporations and Mixed Ownership Government Corporations. *Id.* The law further required the Comptroller General to report any unauthorized financial transactions. *Id* at Section 203.[9] Accordingly, Congress obviously designated Amtrak as a Mixed Government Corporation with the intent to gain further oversight and control over the federal funds that it was appropriating and to look for unauthorized transactions. Applying the FCA, 31 U.S.C § 3729, to claims presented to Amtrak, and treating Amtrak as the Government for purposes of the FCA, furthers the express goal of Congress when it made it a Mixed Ownership Government Corporation. The majority opinion undermines this goal.

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9. "The report shall also show specifically any program, expenditure, or other financial transaction observed in the course of the audit, which, in the opinion of the Comptroller General has been carried on or made without the authority of law."

Moreover, by citing *Rainwater v. United States*, 356 U.S. 590 (1958), Totten did not intend to suggest that the Commodity Credit Corporation, a wholly owned Government Corporation, and Amtrak, a Mixed Government Corporation limited by Section 541, are the same. The structural distinctions that separate them are clear. However, until December 1997 they were both listed as "Government Corporation[s]" as defined by Congress in 31 U.S.C. § 9101(1).[10] Amtrak, given its close relationship with the Government and extensive federal funding, should be treated like "the Government of the United States for purposes of the False Claims Act", *See Rainwater* at page 591-592, to carry out this Congressional purpose: "to protect the funds and property of the Government regardless of the particular form, or function, of the government instrumentality upon which such claims are made." *Id.* at page 592.

3. Circuit Judge Garland's dissenting opinion hews to the letter and the legislative history of the FCA regarding presentation of claims to federal grantees.

a. The differing language of subsections (a)(1) and (a)(2) commands an inference that these provisions describe differing ways in which FCA liability can be incurred.

It is plain that subsection (a)(1) pertains to a false claim presented to the government and that subsection (a)(2) pertains to a false claim without presentation to the government. The legislative history depicts Congress (at the time of the 1986 amendments to the FCA) as gravely intent

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10. Section 9101(1) states: "Government Corporation" means a mixed ownership Government corporation and a wholly owned Government Corporation.

upon protecting every threatened penny of the federal fisc. Despite the overarching zeal of Congress to achieve that end, the Court concludes that Congress was not seeking to shorten the distance between wrongful conduct and FCA culpability. Instead, the D.C. Circuit in *Totten II*, implicitly saw (a)(1) as creating another tier of the federal bureaucracy, a U.S. Department of Re-Presentation, to which every invoice paid by every federal grantee must be sent lest procurement thieves go unpunished.

The D.C. Circuit noted that (a)(2) "is the direct descendant of a clause that could only be read in conjunction with" (a)(1), (*Totten II*, *supra*, at 500), but the fact remains that paragraphs (a)(1) through (7) are now separate statements of the various ways in which one can violate the FCA. The pointed lack of a presentation requirement in (a)(2), as the dissenter notes, calls for the canon of construction that Congress' inclusion of particular language in one section of a statute and its omission of that language from another is intentional. *Totten II*, *supra*, Dissent at 505, citing and quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

Among the untenable ironies of the D.C. Circuit's construction is that, under subsection (a)(3), a person who conspires to defraud a grantee with respect to federal funds would be liable, but that under (a)(2), a person who actually achieves undeserved payment from the grantee would not. This outcome thwarts the letter and legislative history of the FCA.

As the dissenter observed (*Totten II*, *supra*, at 505), the D.C. Circuit reduced subsection (a)(2) to a matter of inculpating those who make false claims indirectly, asserting to no avail that they are protected for not having made false claims themselves. (*Totten II*, *supra*, at 501).

The D.C. Circuit thus marginalized the significance of (a)(2), but the dissenter had a withering reply: ". . . [s]ince this reading still implies that *someone* must have presented the claim for liability to attach under subsection (a)(2), it does not appear to differ from liability under (a)(1) . . ." (*Totten II*, *supra*, at 507).

b. Section 3729 (c) further underscores the clear legislative intent to protect federal dollars given to grantees.

As indicated above, having amended the statute in 1982 and 1986 without significantly altering the language concerning presentment, Congress evinced satisfaction with the judicial interpretations of the clause in effect at the time. However, as if to punctuate this point, Congress added Section (c) that defines "claim" as

> any request or demand . . . made to a grantee . . . if the United States Government provides any portion of the money or property which is requested or demanded or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

As the Government argued challenging the district court, strictly interpreting section (a)(1) to require the presentation of a claim to a government official renders the first portion of Section (c) meaningless. If a claim is defined as a demand for money which was in part satisfied by federal funds, then based upon the majority's interpretation, such a claim is not covered in and of itself. To be covered, the claim must be presented to an official of the United States Government. This interpretation reads this

clause out of the statute or adds another requirement not found on the face of the statute.

Congress spelled out its intent in defining claim. *United States v. Azzarelli Construction Co., et. al.*, 647 F.2d 757 (7th Cir. 1981) is widely cited for the proposition that a claim must first be presented to the United States to be actionable under the FCA. While the court made this statement in discussing the statutory framework of the FCA (*see* page 759), the primary holding of the case is that the FCA does not apply because, in the view of the Seventh Circuit, the United States had suffered no injury. *Id.* at 762. However, in reaction to this statement and other courts that sought to limit the reach of the FCA, Congress crafted the definition of claim. The Legislative History states:

> [I]n United States v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981), the Court held that because the Federal contribution to highway construction was a fixed sum rather than openended . . . the Federal Government could not sue the contractors who had engaged in a bid-rigging conspiracy. This narrow reading of the act throws the entire burden of prosecuting fraud on state officials who may not have the powerful remedies available to the United States under the False Claims Act or the sophisticated investigative resources to even establish the fraud. *Thus, the Committee intends the new subsection [c] to overrule Azzarelli and similar cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors, or other recipients of federal funds.* [Emphasis added] A&P S. Rep. 99-345 page 18 to 19; at page 19.

CONCLUSION

For the foregoing reasons, Totten asks this Court to grant the Petition for A Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED AUGUST 27, 2004

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 03-7128

UNITED STATES OF AMERICA *ex rel.*
EDWARD L. TOTTEN,

Appellant,

v.

BOMBARDIER CORPORATION and ENVIROVAC, INC.,

Appellees.

ROBERTS, *Circuit Judge*: Relator Edward Totten brought a *qui tam* action against Bombardier Corporation and Envirovac, Inc., alleging that those companies violated the False Claims Act, 31 U.S.C. § 3729, by delivering allegedly defective rail cars to the National Railroad Passenger Corporation (Amtrak) and submitting invoices to Amtrak for payment from an account that included federal funds. The pertinent provision of the Act imposes liability for civil penalties and treble damages on anyone who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." *Id.* § 3729(a)(1). Amtrak is not the Government, 49 U.S.C. § 24301(a)(3), and Totten alleged only that the funds Amtrak used to pay

Appendix A

Bombardier and Envirovac came in part from the Government — not that those companies presented their claims to an officer or employee of the Government. The district court accordingly dismissed Totten's complaint. We agree that under the plain language of Section 3729(a)(1), claims must be presented to an officer or employee of the Government before liability can attach. We therefore affirm.

I.

This is Totten's second appeal in this case; the facts are summarized in our opinion in the first, *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 545 (D.C. Cir. 2002) (*Totten I*):

> The dispute giving rise to this case began when Amtrak contracted with two private companies, Bombardier Corporation and Envirovac, Inc. ("the Contractors"), to supply rail cars with new toilet systems for its trains. Bombardier makes the cars and Envirovac makes the toilets. Specifications for the toilet systems were incorporated into Amtrak's contracts with the Contractors. On March 16, 1998, Totten, a former Amtrak employee, filed a suit against the Contractors under the [False Claims Act], alleging that they had supplied unsuitable parts that did not meet the contractual specifications.

According to Totten's amended complaint, Bombardier and Envirovac are liable under the False Claims Act because they submitted periodic invoices to Amtrak for noncompliant rail

cars and Amtrak paid the invoices with funds that included federal grant money.

The district court dismissed the complaint at the threshold, concluding that 49 U.S.C. § 24301(a) — which states that Amtrak "shall not be subject to title 31" — bars False Claims Act suits that involve claims made to Amtrak. *United States ex rel. Totten v. Bombardier Corp.*, 139 F. Supp. 2d 50, 54 (D.D.C. 2001). This court reversed and remanded, holding that Section 24301(a) is not a bar to False Claims Act suits against those who submit claims to Amtrak: in such cases, we reasoned, it is the claimant — not Amtrak — that is rendered "subject to" the Act. *Totten I*, 286 F.3d at 548, 550. The court in *Totten I* "express[ed] no opinion" on another threshold question in the case: "whether [a False Claims Act] plaintiff may prevail against a defendant who submits a false 'claim' to a federal grantee (such as Amtrak), without presenting evidence that the claim was ever actually submitted to the U.S. government." *Id.* at 553.

That question was the focus of the district court's inquiry on remand, after Totten amended his complaint. The court again dismissed the action, noting that the amended complaint alleged only that "the allegedly false claims in this case were presented to and paid by Amtrak, not that the false claims were presented to any federal officer or employee." *United States ex rel. Totten v. Bombardier Corp.*, No. 98-0657, Mem. op. at 7 (D.D.C. Sept. 3, 2003). The district court recognized that 31 U.S.C. § 3729(c) defines "claim" under the Act to include claims made to a grantee if the Government provides all or part of the money to pay the claim, but noted that "Congress nevertheless did not remove

the unambiguous language requiring presentment to the United States" in Section 3729(a)(1). *Id.* at 5. Totten now appeals, and the Government has filed briefs and argued as amicus curiae in support of Totten.[1]

II.

A. Amtrak is Not the Government

Totten — but not the Government — argues that the allegedly false claims in this case *were* presented to the Government, because Amtrak was a mixed-ownership government corporation prior to December 1997 and the Government has continued to hold all of Amtrak's preferred stock, and has provided sizable subsidies to Amtrak, since that date. Totten Br. at 6. This argument is unavailing.[2]

Even prior to 1997 — indeed, at all times since the company was created in 1971 — Amtrak's organic statute has flatly stated that the company "is not a department, agency, or instrumentality of the United States Government."

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1. The statute governing *qui tam* actions under the False Claims Act allows the Government to intervene in the district court and take over responsibility for conducting the litigation. *See* 31 U.S.C. § 3730(b)(2), (4)(A). In this case, the Government chose not to intervene; for its part, Amtrak has not brought any action against Bombardier or Envirovac for the fraud Totten alleges.

2. It was also arguably not preserved for appeal, because it was made only in the most cursory fashion in the district court. We need not decide whether it was adequately preserved, because it was in any event preserved only to fail.

49 U.S.C. § 24301(a)(3); *see also Totten I*, 286 F.3d at 544. In its brief, the Government candidly concedes that "Congress has specified that Amtrak is not itself an agency of the Government." Amicus Br. at 10. And in a case involving the provision that is now Section 24301, the Supreme Court deemed the statute "assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995); *see also Totten I*, 286 F.3d at 544-45 (citing *Lebron*). Totten offers no reason, and we can think of none, why False Claims Act coverage is not a matter "within Congress's control."

The case on which Totten relies, *Rainwater v. United States*, 356 U.S. 590 (1958), is clearly distinguishable. *Rainwater* held that the Commodity Credit Corporation was "part of 'the Government of the United States' for purposes of the False Claims Act," *id.* at 592, but as the Court noted, the statute in that case expressly provided that the Corporation *was* "an 'agency and instrumentality of the United States.' " *Id.* at 591 (quoting Commodity Credit Corporation Charter Act, Pub. L. No. 80-806, § 2, 62 Stat. 1070 (1948)). Amtrak's statute, of course, gives Amtrak the exact opposite status. Attempts to analogize the other facts in *Rainwater* — that all of the Commodity Credit Corporation's employees were employees of the U.S. Department of Agriculture, and that the entire budget of the Corporation came from the federal treasury, *see id.* — are similarly fruitless.

B. Section 3729(a)(1) Requires Presentment to an Officer or Employee of the Government

1. Totten, now with the support of the Government, advances an alternative argument: that a claim submitted to Amtrak is *effectively* a claim presented to the Government. Thus Totten asserts that "the [False Claims Act] covers claims presented to grantees," Totten Br. at 21; *see also* Reply Br. at 2, and relies on dicta from *United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 738 (D.C. Cir. 1998), which suggest that claims presented to grantees may be considered " 'effectively' presented to the United States" if the claims are paid with funds the grantee received from the Government. *See* Totten Br. at 13; *see also* Amicus Br. at 18 (quoting *Yesudian*).

Totten and the Government are unable to refute Envirovac's argument that their reading of the statute would "write the clear unambiguous language of Section 3729(a)(1) entirely out of the Act." Envirovac Br. at 9; *see also* Bombardier Br. at 10-11. Liability under Section 3729(a)(1) arises when any person "knowingly presents, or causes to be presented, *to an officer or employee of the United States Government* . . . a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1) (emphasis added); Totten and the Government offer no plausible explanation for how presentment of a claim to Amtrak can satisfy the clear textual requirement that a claim be presented to a federal officer or employee. Instead, they shift to a textual argument of their own, arguing that a presentment requirement in Section 3729(a)(1) would be "inconsistent with the plain language of [Section] 3729(c)." Amicus Br. at 9; *see also* Reply Br. at 2.

Appendix A

Section 3729(c) defines a claim to include a request or demand for payment made to a grantee "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse . . . [the] grantee . . . for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c). A presentment requirement in Section 3729(a)(1), the argument goes, would mean that False Claims Act liability for claims submitted to grantees would attach only if the claims are presented for reimbursement, and thus would "render[ ] the first 'if' clause meaningless." Amicus Br. at 13.

Not at all. It is quite easy to square the language of Section 3729(c) — including *both* "if" clauses — with the presentment requirement in Section 3729(a)(1). The first "if" clause defines a claim to include claims submitted to grantees if the Government "provides" any portion of the funds used to pay the claim. In a rhetorical sleight of hand, the Government urges that this clause must reach any claim where the money "*has already been* or is being provided by the Federal Government." *Id.* (emphasis added). Such a reading equates the present-tense "provides" in the statute with the past-tense "has provided" in the argument — and thereby runs afoul of the Supreme Court's admonition that "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992).

The word "provides" in Section 3729(c), when appropriately limited to the present tense, squares neatly with a presentment requirement. False Claims Act liability will attach if the Government *provides* the funds to the grantee

upon presentment of a claim to the Government. Liability will also attach if, after the grantee presents the claim, the Government *provides* the funds directly to the claimant: the first "if" clause of subsection (c) — unlike the second — does not circumscribe the set of possible recipients of the federal funds. And under the second "if" clause, liability will attach if the Government — again, upon presentment of the claim — reimburses the grantee for funds that the grantee has already disbursed to the claimant. Nothing about the language of subsection (c) requires ignoring that of subsection (a)(1) to make sense of the statute.[3]

Indeed, Totten and the United States never connect the dots in their argument based on subsection (c). Whatever that argument may show about what constitutes a "claim," it does not respond to the plain requirement of subsection (a)(1) that, to be actionable under the False Claims Act, any such claim must be presented to an officer or employee of the United States Government. As Judge Randolph noted in *Totten I*, it is clear on the face of the statute that "no matter

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3. Although the dissent ultimately does not challenge our reading of subsection (a)(1), it does dispute this explanation of how (a)(1) and (c) can be read together, in the course of pressing its theory that (a)(2) does not require presentment. *See post* at 15-16. According to the dissent, we are wrong to say that "False Claims Act liability will attach if the Government provides the funds to the grantee *upon presentment of a claim* to the Government," because the italicized language does not appear in subsection (c). *See id.* at 498. Of course it does not: our point was not to suggest that subsection (c) itself contains a presentment requirement — it is, after all, a definitional rather than a liability provision — but instead to respond to the erroneous contention that a presentment requirement was somehow inconsistent with the definition of a claim in subsection (c).

how 'claim' is defined, subsection (a)(1) requires the alleged false claimant to present it (or cause it to be presented) to a federal officer or employee." 286 F.3d at 554 (Randolph, J., concurring).

2. In *Yesudian*, the court considered the present question, but expressly concluded that it "need not resolve that question today." 153 F.3d at 739. That was because the issue in *Yesudian* was not liability under the False Claims Act for false claims, but whether an employer retaliated against an employee for filing a *qui tam* action under the Act. Such retaliation, the *Yesudian* court concluded, could be shown without establishing that the *qui tam* plaintiff would have prevailed in his suit. *Id.*; *see Totten I*, 286 F.3d at 546 ("Neither this court nor the Supreme Court has definitively explicated the complex relationship between the definition clause in § 3729(c) and the presentment clause in § 3729(a)(1);" *Yesudian* "declined to answer" the question). The *Yesudian* court noted that the statutory language could be read to require presentment to the United States, but also surmised — relying on the legislative history of the 1986 amendments to the False Claims Act, *see* 153 F.3d at 737-39 — that it was "also possible to read the language to cover claims presented to grantees, but 'effectively' presented to the United States because the payment comes out of funds the federal government gave the grantee," *id.* at 738. Now that the question is which interpretation is correct, as opposed to whether either is arguable, we adhere to the plain language of the statute, rather than invoke the legislative history to embrace a reading at odds with the statutory text.

Appendix A

As an initial matter, the Supreme Court reiterated as recently as this past Term that resort to legislative history is not appropriate in construing plain statutory language. "[W]hen the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." *Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *see also Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (courts should "not resort to legislative history to cloud a statutory text that is clear"); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 n. 3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.").

Totten and the United States do not suggest that the language of Section 3729(a)(1) is somehow not plain; they merely argue that a plain language reading would yield results at variance with the legislative history of the 1986 amendments. Given that we are dealing with plain language, however, there is no way to "construe" the language so that it is satisfied when claims are presented to Amtrak. We could say that submitting a claim to Amtrak is "just like" or "equivalent to" or "effectively" submitting a claim to "an officer or employee of the United States Government," and that subsection (a)(1) is therefore satisfied, but those would just be different ways of saying that we are not going to read (a)(1) as written by Congress. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Totten and the United States imply that the

asserted variance with the legislative history empowers us to ignore the plain language of subsection (a)(1), but such extraordinary power is limited to the situation in which adherence to the plain text leads to an "absurd" result, *see, e.g., Lamie*, 124 S. Ct. at 1030, and no one has suggested that to be the case here.

None of this is to gainsay the argument based on the legislative history, ably advanced (and suitably, given the nature of the question presented) in *Yesudian.* But there would be no need for a rule — or repeated admonition from the Supreme Court — that there should be no resort to legislative history when language is plain and does not lead to an absurd result, if the rule did not apply precisely when plain language and legislative history may seem to point in opposite directions.

Totten and the United States argue that adhering to the plain language would leave intact opinions Congress intended to overrule in the 1986 amendments, but that is not clear with respect to the decision that the Senate Judiciary Committee most clearly intended to overrule — *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). *See* S.Rep. No. 99-345, at 22 (1986) (S. Rep.). *Azzarelli* held that because the federal funds at issue were part of a "fixed and determinate yearly contribution" rather than an "open-ended federal expenditure program," the False Claims Act did not apply. *Azzarelli*, 647 F.2d at 761; *see* S. Rep. at 15, 22 (describing *Azzarelli*'s holding). Under our reading of subsections (a) and (c) of Section 3729, the fixed nature of a federal grant would be no bar to a claimant's liability; such liability would turn on whether the Government "provides"

the funds — in a fixed or variable amount — upon presentment of a claim to the Government. In fact, this presentment requirement was satisfied in *Azzarelli*: the payment scheme clearly required the state to present to the Government claims for reimbursement after it paid the contractors' fraudulent claims. *See* 647 F.2d at 760.

Totten and the United States may be on firmer ground with respect to some of the other cases with which the Committee expressed displeasure. But our point is not to debate the legislative history; rather, "[t]hese uncertainties illustrate the difficulty of relying on legislative history . . . and the advantage of our determination to rest our holding on the statutory text." *Lamie*, 124 S. Ct. at 1034. And whatever degree of confidence about congressional purpose one derives from the legislative history, that purpose must find expression "within the permissible limits of the language" before it can be given effect. HENRY J. FRIENDLY, BENCHMARKS 216 (1967).

At its most broad, the legislative history of the 1986 amendments declares that "a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." S. REP. at 10. Even if the Committee "intended the concept of loss to the United States to be considered broadly," *Yesudian*, 153 F.3d at 739, "no legislation pursues its purposes at all costs," *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 408 (D.C. Cir. 1997) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)) (internal quotation marks omitted). The task of statutory interpretation cannot be reduced to a mechanical

choice in which the interpretation that would advance the statute's general purposes to a greater extent must always prevail over one that would both advance the same ends — though to a slightly lesser extent — and have fewer drawbacks. *See BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1292-93 (D.C. Cir. 2004) (statutory objective of providing tax incentives for certain pipeline owners does not mean all interpretive questions should be resolved in favor of whatever results in most favorable tax treatment for such owners) (citing *Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001)). Nothing in the legislative history of the 1986 amendments suggests that the present False Claims Act is, to borrow a phrase from another context, "the product of monomaniacs." *Student Loan Mktg. Ass'n*, 104 F.3d at 408.

What is more, if the overriding intent of Congress were in fact to delete the requirement that claims be presented to a Government officer or employee, Congress could readily have done just that — amend subsection (a)(1) to provide that claims be presented to the Government *or a grantee or recipient of Government funds.* But Congress did not touch (a)(1) at all in 1986. Congress proceeded quite elliptically if its intent were to eliminate the requirement of presentment to the Government in the case of claims against grantees.

In the final analysis, we can remain agnostic on the question whether Congress intentionally left the presentment requirement in Section 3729(a)(1) or simply forgot to take it out. The suggestion that Congress may have "dropped a stitch," *Yesudian*, 153 F.3d at 738, is not enough to permit us to ignore the statutory text. The Supreme Court reminded us in the Term just ended that " '[i]t is beyond our province

to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.' " *Lamie*, 124 S. Ct. at 1034 (quoting *United States v. Granderson*, 511 U.S. 39, 68, (1994) (Kennedy, J., concurring)) (ellipsis in *Lamie*); *see also Consolidated Rail Corp. v. United States*, 896 F.2d 574, 579 (D.C. Cir. 1990) (courts are generally not "free to 'correct' what they believe to be congressional oversights by construing unambiguous statutes to the contrary of their plain meaning").

There are good reasons for this rule; a court's attempt to correct a statute can often create new problems. At least three complications could flow from the proposed correction. First, as Judge Randolph observed in *Totten I*, extending False Claims Act liability here seems to result in quadruple liability for false claimants: a grantee could presumably bring suit and obtain a recovery for itself, in addition to the treble damages the Government and the relator divvy up under the Act. *See* 286 F.3d at 554 (Randolph, J., concurring). Totten's response — "So be it," Opposition to Mots. to Dismiss at 30 — is candid but not reassuring.

Second, authorizing suit on behalf of an entity to which a claim was not presented raises complicated questions in applying the statute's scienter requirement: if the claimant has told the grantee pertinent facts that would, in the absence of such disclosure, make a claim fraudulent, it seems that the claimant has not "knowingly" presented a false claim *to the grantee. See, e.g., United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999) ("[T]he government's knowledge effectively negates the fraud or falsity required by the [Act]."). *But see United States ex rel. Hagood v.*

Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("The requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not in itself a defense."). It is unclear how to apply the "knowingly presents" element when the Government itself (or a relator) brings suit for claims made to a grantee, if there is no longer any requirement of presentment to the Government.

Third, an "effective" presentment approach would make the potential reach of the Act almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants — as most of them do. The *Yesudian* court recognized this concern:

> It may be that this reading . . . should not apply to all grantees. It may not be appropriate, for example, where the grantee's federal funds are an insubstantial percentage of its total budget, where there is little likelihood that any of a defendant's money actually came from the federal grant, or where there is little continuing contact between the grantee and the government once the grant is made.

153 F.3d at 738. Such an imprecise line of demarcation, however, seems little more than a prescription for even more collateral litigation under the False Claims Act.

Our point is not that these problems would inevitably arise. It is instead that the prospect of them, and others we

have not anticipated, reminds us that our job is reading statutes as written, not rewriting them "in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985).

III.

A.

Our dissenting colleague prefers to sidestep the question whether Section 3729(a)(1) requires presentment and rest his decision instead on subsection (a)(2). That provision is directed at those who make false statements to get the Government to pay false claims, and has no express requirement of presentment to an officer or employee of the United States Government. None of the parties argued that subsection (a)(2) could provide the grounds for resolving this case during the six years the case was pending before reaching us for oral argument: not in the first round of litigation that included the appeal to this court in *Totten I*, not in the district court below on remand, and not in the initial briefing on this appeal. *See* Totten Suppl. Br. at 1 ("Neither side had addressed [the possible application of subsection (a)(2) instead of (a)(1)] in the court below or in the briefs submitted to this Court.").

Ordinarily, arguments that parties do not make on appeal are deemed to have been waived. *See, e.g., Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108 n. 4 (D.C. Cir. 2003) (argument petitioner raised for first time at oral argument is "waived because it was not raised in [petitioner's] briefs"); *Narragansett Indian Tribe v. National Indian Gaming*

Comm'n, 158 F.3d 1335, 1338 (D.C. Cir. 1998) ("[W]e ordinarily do not entertain arguments not raised by parties"); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) (under "well settled" rule, "issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal"). The court has authority to remedy errors *sua sponte* in "exceptional circumstances" — when they "seriously affect the fairness, integrity, or public reputation of judicial proceedings," *United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 425 (D.C. Cir. 2002) (quotation omitted) — but no one has suggested that this is such a case. A party's failure to pursue one of several available lines of argument is hardly an "error" of the sort that would warrant exercising our narrowly circumscribed remedial authority.

We regularly attempt to avoid *constitutional* questions by resting decision on a statutory basis, *see Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48 (1936), but there is no comparable doctrine that would favor avoiding one question of statutory interpretation — the one litigated by the parties that was the basis for decision below — by proposing, and then answering, a different one not posed by the parties or addressed by the district court. Even if such a "statutory avoidance" doctrine existed, it is difficult to see why we would invoke it in this case: the proper construction of Section 3729(a)(2) seems harder, not easier, than that of Section 3729(a)(1).[4]

4. The cases the dissent cites to rebut this point, *see post* at 3 & n.3, are far afield. Resting on (a)(1) would not implicate an antecedent but unaddressed issue, as in *United States National Bank of Oregon vs. Independent Insurance Agents of America*, 508 U.S. 439, 447

(Cont'd)

The dissent chides us for responding to its analysis of (a)(2), but a response is appropriate given the dissent's determination to embrace a reading of (a)(2) that would render the plain language reading of (a)(1) largely meaningless. In short, we would prefer not to reach an issue the parties did not in the six previous years of litigation, but now that the dissent insists on putting it on the table, we are obliged to explain why the proper resolution of that issue does not undermine our reading of (a)(1) — the issue the parties did raise, and which was decided below.

B.

The dissent's effort to avoid deciding the presentment issue by looking to Section 3729(a)(2) is ultimately unavailing — which may explain why the approach was never suggested by appellant, appellees, amicus, or the district court. Making false records or statements to get a false claim paid or approved by Amtrak is not making or using "a false record or statement to get a false or fraudulent claim paid or approved *by the Government*," 31 U.S.C. § 3729(a)(2) (emphasis added).

(Cont'd)

(1993), nor is the (a)(2) issue one that has arisen because of an intervening decision of this court, as in *Acree v. Republic of Iraq*, 370 F.3d 41, 58 (D.C.Cir. 2004). Finally, in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1030 (D.C.Cir. 2004), a sovereign defendant had failed to appear altogether. The *Cicippio* court's decision to order briefing on certain questions *sua sponte* has no relevance to this case, in which Totten has litigated vigorously — but not at all on (a)(2).

We are apparently in agreement with the dissent that Amtrak is not "the Government" for False Claims Act purposes. *See supra* at 4-5. But in concluding that Section 3729(a)(2) reaches the alleged false statements in this case — statements that induced *Amtrak* to pay false claims — the dissent finds that payment by Amtrak is payment "by the Government" because some of the funds came from a federal grant to Amtrak. As support for this reading, the dissent points to Section 3729(c), which, as we have seen, provides that the term "claim" includes requests made to grantees and other recipients "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse [the recipient] for any portion of the money or property." *Id.* § 3729(c). In short, the dissent believes that Section 3729(c) collapses the distinction between the Government and its grantees where liability under Section 3729(a)(2) — but apparently not under Section 3729(a)(1) — is concerned. Totten and the Government advanced the same view, when prodded by our order requesting supplemental briefing on the (a)(2) question. Totten Suppl. Br. at 13 ("The import of Section 3729(c) is that it broadens who constitutes the Government under the False Claims Act."); Amicus Suppl. Br. at 12-13 ("[A] claim is paid 'by the Government' either if the government pays it directly or if the money is disbursed by a third-party funding recipient who receives from the government all or part of the funding for the payment").

This reading has a fatal flaw: it yields exactly the same meaning that would result if Section 3729(a)(2) did not contain the words "by the Government" at all. If Congress had intended to predicate liability under subsection (a)(2)

on payment or approval *either* by the Government itself *or* by a grantee using federal funds, then a reference to false records or statements made "to get a false or fraudulent claim paid or approved" would have been enough. That is exactly what subsection (a)(2) provided *before* the 1986 amendments. By adding subsection (c) in 1986 to provide that "claim" included claims against a grantee or recipient, Congress arguably could have achieved the result for which Totten and the Government contend simply by leaving (a)(2) untouched. Congress did not do that. At the same time it added subsection (c), Congress added the words "by the Government" to (a)(2). False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2(3), (7), 100 Stat. 3153, 3153-54. Notably, Congress did not say "by the Government or a grantee, contractor, or other recipient as provided in subsection (c) of this section."[5]

It is, of course, a "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Alaska Dep't of Envtl. Conservation v. EPA*, 124 S. Ct. 983, 1002 n. 13 (2004) (quotation omitted); *see also Hibbs v. Winn*, 124 S. Ct. 2276, 2286 (2004) ("rule against superfluities" bars a reading that would have one of several words in statutory provision "do all the necessary work"); *Duncan v. Walker*,

5. The dissent purports to make a plain language argument, but has to alter the statutory words to make its point, asserting that "paid by the Government" means "paid with government money." *See post* at 506. The statute does not talk of "government money" or, the term the dissent employs elsewhere, "federal monies." It speaks of claims "presented . . . to an officer or employee of the United States Government . . . for payment or approval" and claims "paid or approved by the Government."

533 U.S. 167, 174 (2001). Moreover, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). The intended effect of adding "by the Government" at the same time as subsection (c) is fairly obvious: Congress was referring back to the presentment requirement of Section 3729(a)(1). And in so doing, Congress was reinforcing — rather than abandoning — the distinction between the Government and its grantees that might otherwise have been blurred by the addition of Section 3729(c).[6]

The parallel structure of (a)(1) and (a)(2) strongly supports this interpretation. Subsection (a)(1) refers to presenting claims to the Government for "payment or approval;" subsection (a)(2) to making false statements to get claims "paid or approved by the Government." As it turns

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6. The dissent's suggestion that "by the Government" was added to clarify that the Act reaches false claims only where the Government "directly or indirectly provides the funds and suffers the loss," *post* at 507-08 n. 8, does not hold up; the definition of "claim" already contains that limitation. *See* 31 U.S.C. § 3729(c). The dissent is unwilling to give the addition of "by the Government" to (a)(2) any weight because it cannot find a statement in any committee report explaining what Congress intended to accomplish by that amendment. *See post* at 507-08. But statutory language cannot be slighted simply because it is not addressed in legislative history. *See, e.g., New York v. FERC*, 535 U.S. 1, 20-21 (2002). The case cited by the dissent — *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119 (2003) — rejected an argument that Congress accomplished a significant *change* without discussion. The presentment requirement, however, has been in the statute for 140 years. The addition of "by the Government" did not change but confirmed that.

out, that parallel structure is no accident. Prior to 1982, the liability provisions of the False Claims Act were contained in one unwieldy sentence that had survived, with only minor modifications, since the Act's enactment in 1863:

> Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, . . . knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim*, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained. . . .

31 U.S.C. § 231 (1976) (emphasis added).

In 1982, Congress undertook a comprehensive revision of Title 31 of the U.S.Code and substituted "simple language . . . for awkward and obsolete terms." H.R.REP. NO. 97-651, at 1 (1982). As part of this revision, the single interminable sentence constituting the False Claims Act (of which only a small portion is quoted above) was divided into the numbered subsections of Section 3729(a). Congress made it extremely

clear, however, that the bill "ma[de] no substantive change in the law." *Id.* at 3; *see also id.* at 1 ("The purpose of the bill is to restate in comprehensive form, without substantive change, ... laws related to money and finance"); *id.* at 2 ("In making changes in the language, precautions have been taken against making substantive changes in the law.").

The present Section 3729(a)(2), therefore, is the direct descendant of a clause that could only be read in conjunction with what is now Section 3729(a)(1): the reference to "such claim" was a shorthand reference to the claim already identified in the current subsection (a)(1) — that is, a claim that would be presented or caused to be presented to the United States.[7] The legislative history even explains why the word "such" disappeared from the statute: Congress removed it in light of the general purpose of the 1982 revision — to make the statute more readable. *See id.* at 3 ("The word 'such' is [no longer] used as a demonstrative adjective.").

The dissent reads the 1982 revision to effect a significant substantive change. Rather than accepting that "paid or approved" in subsection (a)(2) is an invocation of "payment or approval" in (a)(1), the dissent seizes onto the absence of

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7. The dissent offers a different interpretation of "such claim," arguing that it refers to a "claim upon or against the Government of the United States" rather than to a claim presented to the United States. *See post* at 509 & n. 11. Within the framework of the pre-1982 version of the statute, we fail to see how the dissent's reading is any different from our own: a claim could not be upon or against the Government unless it was presented to the Government. The parallel between presented to the Government for payment or approval and paid or approved by the Government confirms the point.

any discussion of presentment in subsection (a)(2) and concludes that Congress had a wholly different type of liability in mind — one in which presentment of a claim is irrelevant, so long as a defendant happens to have made a false record or statement. The various subsections of Section 3729(a) must of course be read disjunctively, because the word "or" appears between subsections (a)(6) and (a)(7), but that word is not a license to ignore the provenance of subsection (a)(2) in construing what "paid or approved by the Government" in that subsection means. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:05, at 165-66 (6th ed. 2000) ("[A] statutory subsection may not be considered in a vacuum . . . ; courts should not rely too heavily upon characterizations such as 'disjunctive' ") (footnote omitted).

To the extent that the Government buttresses its reading of Section 3729(a)(2) with citations to the legislative history of the 1986 amendments, *see, e.g.*, Amicus Suppl. Br. at 13, such reliance is gravely misplaced: the Senate report was based on a version of the bill *that did not yet include the provision adding the words "by the Government" to subsection (a)(2).* *See* S. REP. at 39. It thus makes little sense to protest that giving effect to those restrictive words would run counter to some of the report's sweeping explanations of the Senate Judiciary Committee's intent.

The proposition that subsection (a)(2) harkens back to (a)(1), and that the latter requires presentment, is supported in scholarly commentary on the False Claims Act. A leading treatise on the False Claims Act states that "[t]he three requirements of Section [3729](a)(1)" — including the requirement "that a claim be presented to the United States" — are "still applicable" to Section 3729(a)(2). 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND

QUI TAM ACTIONS § 2.01[B], at 2-21 (2d ed. Supp. 2004-1). The dissent's contrary conclusion — that subsection (a)(2) does not require any presentment that may be required under subsection (a)(1) — has tellingly little support.

The dissent's reading of (a)(2) would make the presentment requirement in (a)(1), which the dissent does not challenge head-on, largely meaningless. In most cases false records or statements are made or used to get false claims paid or approved. If the dissent's view prevailed, the plain language requirement in (a)(1) that claims be presented to an officer or employee of the Government would only trip up those foolish enough to rely on (a)(1) rather than (a)(2) — and even they might find a court willing to excuse their omission. The dissent candidly views this as all well and good — a way of "reconciling § 3729(a) as a whole with § 3729(c) and the legislative history," *post* at 2 — but it is not our task to find ways of circumventing plain statutory language.[8] Allowing (a)(2) to swallow (a)(1) is particularly egregious, since it seems clear that (a)(2) is complementary to (a)(1), designed to prevent those who make false records or statements to get claims paid or approved from escaping liability solely on the ground that they did not *themselves* present a claim for payment or approval. *See United States ex. rel. Harris v. Bernad*, 275 F. Supp. 2d 1, 6 (D.D.C. 2003) ("the main purpose of section 3729(a)(2) is to remove

8. The dissent asserts that it is not guilty of this transgression because there is no plain language presentment requirement in (a)(2). *See post* at 2 n.2. This misses the point: there is a plain language presentment requirement in (a)(1) and the dissent's reading of (a)(2) would circumvent that. Elsewhere the dissent recognizes that "words of a statute must be read in context and with a view to their place in the overall statutory scheme." *See post* at 14 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

any defense that the defendants themselves did not submit false claims to the government") (citing BOESE, *supra*, at § 2.01[B]). This is presumably why (a)(2) was not argued by the parties throughout this litigation. To the extent the dissent's reading of (a)(2) does not completely swallow (a)(1), it leads to an anomalous result: a defendant who makes a false record to help someone else get a false claim paid or approved by a grantee would be covered by the Act, but a defendant who actually presents a false claim to the grantee for payment or approval would not be.

The dissent seems to recognize that a false record cannot be said to be used to get the Government to "approve" a claim if the Government has no role to play because there is no presentment, but contends that the situation is very different under the payment prong of (a)(2). *See post* at 5-6. But under that prong as well the false record does not prompt any action "by the Government" under the dissent's view, but only by the grantee or contractor. The dissent hinges coverage on the presence of funds that can trace their genealogy to the Government, without explaining the limits of this non-statutory "federal monies" concept. If, as was actually largely the case here, *see* Decl. of Carol J. Dillon; Decl. of Brian Adam, Amtrak pays Bombardier with proceeds from a Canadian Export Development Corporation loan and an Export Development Bank loan, and then repays the loans with money from its capital budget, it is not clear that Bombardier's claims — as opposed to those of the Export Corporation and Bank for repayment — are satisfied out of federally provided funds. And it remains unclear whether "federal monies," which apparently retain that character under the dissent's view even though no further government role is involved, are still "federal monies" when

passed along to subgrantees or subcontractors, employees and suppliers of subgrantees and subcontractors, and so on.[9]

* * *

The dissent literally begins and ends with legislative history. *See post* at 1, 22-23. We will end as we began, too, but with the statutory language: Section 3729(a)(1) imposes liability on anyone who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." That was not done here; claims were presented only to Amtrak for payment or approval, and Amtrak is not the Government. Section 3729(a)(2) imposes liability on anyone who makes a false record or statement "to get a false or fraudulent claim paid or approved by the Government." That too was not done here; the records were made to get claims paid or approved by Amtrak, and Amtrak is not the Government.

The judgment of the district court is affirmed.

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9. The policy concern that the Government invokes and that the dissent repeats — that requiring presentment will "withdraw[ ] False Claims Act protection" from a "broad swath of false claims," *see post* at 23 (quoting U.S. Br. at 9) — rather plainly begs the question. In addition, the Government is of course free to structure its grants in such a way as to require presentment and thereby trigger coverage under the False Claims Act, and often does so. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943) ("It was a prerequisite to respondents' payment by the [grantee] that . . . estimates be filed, transmitted to, and approved by, the [Government] authorities.").

Appendix A

GARLAND, *Circuit Judge*, dissenting: The False Claims Act, "adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts," S.Rep. No. 99-345, at 8 (1986), is the "Government's primary litigative tool for combating fraud," *id.* at 2. Today, the court adopts an interpretation that, the government warns, leaves "vast sums of federal monies" without False Claims Act protection. Oral Arg. Tr. at 3. Under the court's interpretation, the government[1] cannot recover against a contractor that obtains money by presenting a false claim to a federal grantee — even if every penny paid to the contractor comes out of an account comprised wholly of federal funds — unless the grantee "re-presents" that false claim to a federal employee. Although Amtrak receives billions of dollars in federal funds that it uses to pay contractor invoices, because it does not (and is not required to) re-present those invoices to the federal government, the court's ruling immunizes those who defraud even that government-funded corporation from False Claims Act liability.

My colleagues concede that 31 U.S.C. § 3729(a)(2) "has no express requirement of presentment to an officer or employee of the United States Government." Op. at 13. The court's interpretation of that subsection as *requiring* presentment is thus inconsistent with its plain text — as well

1. Although in the instant case the plaintiff is a private "relator" suing in the name of the government, *see* 31 U.S.C. § 3730(b), the statute authorizes the government to sue in its own name or to take over a relator's suit and conduct the action itself, *see id.* § 3730(b)(2), (b)(4)(A). The statute's substantive provisions are the same regardless of whether the government or a relator prosecutes the action.

as with the statutory definition of "claim" contained in § 3729(c). Moreover, the court's interpretation is not just inconsistent, but irreconcilable, with the legislative history of the 1986 Amendments to the False Claims Act. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562 § 2(c), 100 Stat. 3153 (Oct. 27, 1986) (hereinafter 1986 Amendments). The court marches on nonetheless, surrounding itself on all sides with "canons" of statutory construction, which serve here as "cannons" of statutory destruction. Although I have no quarrel with the canons the court has chosen, properly deployed they do not support the position it has taken in this case.

I

I begin with a preliminary matter: I am perplexed by the court's long prologue protesting the propriety of deciding the meaning of § 3729(a)(2), followed immediately by its decision on that very issue. *See* Op. at Part III.A.

First, the rationale for exploring the meaning of subsection (a)(2) is straightforward. As discussed in *United States ex rel. Yesudian v. Howard University*, the conclusion that liability under § 3729(a)(1) requires that a false claim be presented to the government rather than a grantee is difficult to reconcile with § 3729(c), and perhaps impossible to reconcile with the Act's legislative history. 153 F.3d 731, 737-38 (D.C. Cir. 1998); *see infra* Parts III, IV. Nonetheless, subsection (a)(1)'s language renders this reading "possible," *Yesudian*, 153 F.3d at 738, and perhaps would not alone warrant a dissent. As discussed below, however, what is a plausible reading of subsection (a)(1) — given its "presents,

or causes to be presented" language — is not plausible for subsection (a)(2), which contains no such language.

Moreover, even if subsection (a)(1) were read as imposing a presentment requirement, reading subsection (a)(2) as *not also* imposing such a requirement goes a long way toward reconciling § 3729(a) as a whole with § 3729(c) and the legislative history that indicates Congress intended to reach false claims made to grantees.[2] Hence, there is good reason to interpret both subsections (a)(1) and (a)(2) at the same time, because the reasonableness of the interpretation of the former may rest on the meaning assigned to the latter.

Second, there is no procedural impropriety in deciding the meaning of subsection (a)(2) here. The plaintiff's complaint — which the district court dismissed on the pleadings — was not limited to subsection (a)(1), but rather asserted liability under "31 U.S.C. § 3729" in its entirety. Am. Compl. ¶¶ 11, 63, 107. His district court pleadings were more specific, charging a violation of "§ § 3729(a)(1) - (a)(3)." Pl.'s Opp'n to Mots. to Dismiss, at 2. Indeed, our own prior decision in this case noted that "the sections relevant here" proscribe (inter alia) " 'false records or statements' used to induce [false] claims, *see* § 3729(a)(2)." *United States ex rel. Totten v. Bombardier*, 286 F.3d 542, 551 (D.C. Cir. 2002) (hereinafter *Totten I*).

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2. As discussed below, achieving such a reconciliation would not "circumvent[ ] plain statutory language," Op. at 501, as there is no language of presentment — "plain" or otherwise — in § 3729(a)(2).

Although initially the plaintiff did not separately address the meaning of subsection (a)(2), he did argue that the False Claims Act (FCA) does not contain a presentment requirement. *See* Appellant's Br. at 5, 11-18, 21; Pl.'s Opp'n at 25-30. After oral argument in this court, we ordered supplemental briefing specifically "addressing the application of 31 U.S.C. § 3729(a)(2) to this case." Order (Apr. 20, 2004) (per curiam). The issue has now been fully briefed, removing the fairness concerns that ordinarily militate against entertaining arguments not initially presented. *See, e.g., Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n. 4 (D.C. Cir. 1990) ("We require petitioners and appellants to raise all of their arguments in the opening brief to prevent 'sandbagging' of appellees and respondents and to provide opposing counsel the chance to respond."). There is, therefore, no impediment to our consideration of the meaning of subsection (a)(2).[3]

Finally, my colleagues simply "protest too much." WILLIAM SHAKESPEARE, HAMLET, act III, sc. 2. No one has compelled them to address this issue. If they truly thought that determining the meaning of subsection (a)(2)

3. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. 439, 445-48 (1993) (holding that this court had authority, after ordering supplemental briefing, to decide the validity of a statutory section despite the parties' failure to dispute it); *Acree v. Republic of Iraq*, 370 F.3d 41, 48, 58 (D.C. Cir. 2004) (determining the validity of a cause of action, an issue not addressed by the parties, after advising the parties that it would be addressed at oral argument); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1030 (D.C. Cir. 2004) (considering an issue not raised by the parties after giving them an opportunity to submit supplemental briefing).

were somehow inappropriate, they could have resisted the temptation and left the issue undecided.

Having dispensed with these preliminaries, I now proceed directly to the question of whether liability under § 3729(a)(2) of the False Claims Act requires presentment (or representment) of a claim to a government employee, rather than to a grantee like Amtrak. Part II discusses the text of subsection (a)(2), while Part III addresses the related text of subsection (c). Part IV considers the legislative history of the 1986 Amendments, and Part V reviews the various policy arguments my colleagues advance in support of their position.

II

"The starting point in discerning congressional intent is," of course, "the existing statutory text." *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 1030 (2004). Subsection (a)(2) imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2); *see id.* § 3729(c) (defining "claim" as, inter alia, "any request ... for money ... which is made to a ... grantee ... if the United States Government provides any portion of the money ... which is requested"). As charged in the complaint, defendants Envirovac and Bombardier made false statements in order to get false claims paid with government money. Accordingly, defendants' conduct appears to fall within the proscription of subsection (a)(2).

The court's textual response to this argument is that the defendants' conduct does not fall within subsection (a)(2) because the defendants presented their false claims to Amtrak rather than to a government employee. It is true that a different subsection — (a)(1) — does contain presentment language. *See* 31 U.S.C. § 3729(a)(1) (imposing liability on anyone who "knowingly presents or causes to be presented, to an officer or employee of the United States Government" a false or fraudulent claim). Indeed, it is upon that language that the court bases its conclusion that presentment is required for liability under subsection (a)(1). Op. at 490, 495-96. As already noted, however, the court concedes that subsection (a)(2) contains "no express requirement of presentment to an officer or employee of the United States Government." *Id.* at 13. And the absence of presentment language in (a)(2), coupled with its presence in (a)(1), cannot help but call to mind a traditional canon of construction: "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 951, 151 L.Ed.2d 908 (2002) (internal quotation marks omitted); *see Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding . . . that the differing language in the two subsections has the same meaning in each.").[4]

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4. The court also finds support for its presentment theory in what it calls the "parallel structure" of subsections (a)(1) and (a)(2):

(Cont'd)

Lacking any reference to presentment in subsection (a)(2), the court contends that the words "by the Government" have the same effect. But if Congress had meant the same thing, it would have said the same thing. *See id.* The court might yet have an argument if subsection (a)(2) were limited to false claims "approved" by the government. But the subsection's requirement is that the claim be "paid *or* approved by the Government." 31 U.S.C. § 3729(a)(2) (emphasis added). And as the court recognizes, we should endeavor to construe statutes so that no "word shall be superfluous." Op. at 499 (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 124 S. Ct. 983, 1002 n.13 (2004)) (internal quotation marks omitted). Hence, claims "paid by" the government suffice for subsection (a)(2) liability, whether approved by it or not.

(Cont'd)

"Subsection (a)(1) refers to presenting claims to the government for 'payment or approval;' subsection (a)(2) to making false statements to get claims 'paid or approved by the Government.' " Op. at 499-500. But these two subsections are not "parallel" at all. Instead, they are quite distinct, imposing liability on different kinds of fraud: the first captures the person "who . . . *presents*. . . to an . . . employee of the United States Government . . . a false . . . claim for payment or approval"; the second catches the one "who . . . *makes* . . . a false . . . statement to get a false . . . claim paid or approved by the Government." 31 U.S.C. § 3729(a)(1), (2). The fact that both subsections require some form of payment or approval does not mean that they both require presentment to a government official.

But, the court counters, the payment to the defendants was not a payment "by the Government" since Amtrak — a government grantee rather than the government itself — wrote the check. The implications of the court's argument are breathtaking, because they do more than just impose a requirement of re-presentment. If payment "by the government" means that the government itself must write the check, then fraud on grantees who pay their own contractors is not covered by the False Claims Act regardless of whether claims are re-presented to a government employee.

The statutory language requires no such result. In common parlance,[5] the fact that expenses are "paid by" an entity does not mean that the entity paid them directly. When a student says that his college living expenses are "paid by" his parents, he typically does not mean that his parents send checks directly to his creditors. Rather, he means that his parents are the ultimate source of the funds he uses to pay those expenses. *See* United States Suppl. Br. at 12-13 (arguing that "a claim is 'paid by the Government' either if the government pays it directly or if the money is disbursed by a third-party funding recipient who receives from the government all or part of the funding for the payment"); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943) ("Government money is as truly expended whether by checks drawn against the Treasury to the ultimate recipient or by grants in aid. . . .").[6]

5. *See Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning.") (internal quotation marks omitted).

6. In the related context of 18 U.S.C. § 641, which criminalizes embezzlement of "money or thing[s] of value of the United States," courts have held that "federal grant money does not lose its federal character simply because it is administered by a nonfederal agency." (Cont'd)

This interpretation of "paid by the Government" — as requiring that the government be either the direct or indirect source of the funds — is confirmed by § 3729(c), which defines the word "claim." As discussed in Part III, § 3729(c) provides that a request for money made to a grantee is a "claim" under the FCA "if the United States Government provides any portion of the money or property . . . , or if the Government will reimburse such . . . grantee, or other recipient for any portion of the money or property." 31 U.S.C. § 3729(c). This interpretation is also supported by the legislative history of the 1986 Amendments which, as discussed in Part IV, stresses that a "false claim is actionable although the claims or false statements were made to a party other than the Government, *if the payment thereon would ultimately result in a loss to the United States.*" S.Rep. No. 99-345, at 10 (emphasis added); *see* H.R. Rep. No. 99-660, at 21 (1986).

The court protests that this reading of "paid by the Government" has a "fatal flaw: it yields exactly the same meaning that would result if Section 3729(a)(2) did not contain the words 'by the Government' at all." Op. at 16. Not so. Those words make clear that, for liability to attach,

(Cont'd)

United States v. Largo, 775 F.2d 1099, 1102 n.3 (10th Cir. 1985); *see, e.g.*, *United States v. Long*, 996 F.2d 731 (5th Cir. 1993) (holding that a university's funds, received from a state agency but originating in the federal treasury, retained their federal character for purposes of § 641); *United States v. Foulks*, 905 F.2d 928 (6th Cir. 1990) (finding that grant funds in the possession of the Toledo Salvation Army constituted funds of the United States); *United States v. Scott*, 784 F.2d 787, 790- 91 (7th Cir. 1986) (concluding that theft of funds from a local government agency, which was primarily funded by the federal government, appropriately triggered § 641).

the government must have been the source of the funds either directly or indirectly; that is, the fraud must ultimately result in a loss to the government. Indeed, without those words, the subsection could be read to make liable any person who "knowingly makes . . . a false statement . . . to get a false or fraudulent claim paid" by *anyone*.

Finally, if subsection (a)(2) does contain an implicit presentment requirement as my colleagues suggest, one is entitled to ask whether their reading doesn't have the "fatal flaw" they ascribe to mine: it allows subsection (a)(1) "to swallow" (a)(2), leaving the latter with no (or very little) independent meaning. Op. at 21. My colleagues wait until virtually the last page of their opinion to say what they think subsection (a)(2) means: "[I]t seems clear," they say, "that (a)(2) is . . . designed to prevent those who make false records or statements to get claims paid or approved from escaping liability solely on the ground that they did not *themselves* present a claim for payment or approval." *Id.* (citing *United States ex rel. Harris v. Bernad*, 275 F. Supp. 2d 1, 6 (D.D.C.2003), citing, in turn, JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS § 2.01[B], at 2-22 (2d ed. Supp. 2004-1)). But since this reading still implies that *someone* must have presented the claim for liability to attach under subsection (a)(2), it does not appear to differ from liability under (a)(1) — or subsection (a)(3) for that matter — which itself ensures that one cannot avoid liability for false claims that he causes but does not himself present. 31 U.S.C. § 3729(a)(1) (making liable anyone who knowingly presents, "or causes to be presented" a false claim); *see id.* § 3729(a)(3) (same for anyone who "conspires to defraud

the Government by getting" a false claim paid).[7] The court's restrictive reading is neither clear from the statutory text nor supported by anything more than district court dicta, which in turn is supported by nothing more than a statement in a practitioner's guide, which itself contains no explanation for the conclusion that it draws. *See Bernad*, 275 F. Supp. 2d at 6 (citing BOESE § 2.01[B], at 2-22).

B

Without support in the statutory text, the court retreats into legislative history — an ironic choice, given the court's protestations in the early pages of its opinion. But the retreat is to no avail.

First, noting that the phrase "by the Government" was added in 1986, the court concludes that it must have added something new to the statute's previous meaning. "The intended effect of adding 'by the Government,' " the court says, "is fairly obvious: Congress was referring back to the presentment requirement of Section 3729(a)(1)." Op. at 17. But that divination of congressional intent is not obvious at all. "Paid by the Government" is not a phrase that brings "presented to the Government" to mind, and there was no reason for Congress to employ different language to express the same concept. *See Russello*, 464 U.S. at 23. Nor does the legislative history support the court's view of

7. Indeed, the authority cited by the court acknowledges that under this reading, "many violations of [(a)(2)] may also be considered violations of Section (a)(1) under the 'causes to be presented' language," and the "distinctions between the two sections may be even smaller than they first seem." BOESE § 2.01[B], at 2-22.

congressional intent: not one word in the 1986 legislative history even mentions the addition of "by the Government," let alone reflects such an intent.[8]

Indeed, as discussed in Part IV, the legislative history suggests precisely the opposite. The same Congress that added "by the Government" also expansively defined the term "claim" to make clear that the FCA covers fraud on grantees, whether or not accompanied by presentment to the government. It is difficult to believe that this Congress, after proclaiming its purpose to reach fraud regardless of presentment, then subverted that purpose using words that do not mention presentment at all. Accordingly, rather than add something new to the FCA, the better explanation is that those words were intended to *clarify* what the Supreme Court had long held: that the FCA reaches only those false claims that ultimately result in losses to the United States. *See United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *Marcus*, 317 U.S. at 544-45. Indeed, that reading is in keeping with the overall purpose of the 1986 Amendments, which was to "*clarif[y]* that the statute permits the Government to

8. As the preceding discussion makes clear, my colleagues are incorrect on two counts in saying that "[t]he dissent is unwilling to give the addition of 'by the Government' to (a)(2) any weight because it cannot find a statement in any committee report explaining what Congress intended to accomplish by the amendment." Op. at 17-18 n.6. First, I do give "by the Government" weight: it clarifies that the FCA only reaches false claims where the government directly or indirectly provides the funds and suffers the loss. Second, my argument does not rest on the absence of legislative history, but rather on the best interpretation of the language of § 3729(a)(2) and (c). The absence of legislative history merely (and completely) counters my colleagues' own suggestion that the legislative history supports their interpretation.

sue under the False Claims Act for frauds perpetrated on Federal grantees, including States and other recipients of federal funds." S. Rep. No. 99-345, at 21 (emphasis added).

Next, the court retreats even deeper into legislative history, tracing the FCA's language and structure all the way back to 1863. As the court notes, from 1863 through 1982, the liability provisions of the FCA were contained in a single, "interminable" sentence codified at 31 U.S.C. § 231. Op. at 18-19. That sentence (with clause numbers inserted for ease of reference) made liable any person:

> *who* [1] shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, . . . knowing such claim to be false, fictitious, or fraudulent, *or who*, [2] for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, *or who* [3] enters into any agreement, combination, or conspiracy to defraud the Government of the United States, . . . by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, *or who*, [4] having charge, possession, custody, or control of any money or other public property . . . , with intent

> to defraud the United States ... delivers ... any amount of such money or property less than that for which he received a certificate or took a receipt, *and every person who....*

31 U.S.C. § 231 (1976) (emphasis added). Contrary to the court's characterization, Op. at 19, I do not disagree that Congress intended no substantive change when, in 1982, it divided this sentence into the numbered subsections of 31 U.S.C. § 3729(a). *See* Pub. L. No. 97-258, § 1, 96 Stat. 978 (Sept. 13, 1982); H.R. Rep. No. 97-651, at 1 (1982). But I do disagree with the conclusion the court draws from that fact, since in my view the second clause of the pre-1982 FCA did not contain a presentment requirement.

The first clause of the "interminable" sentence is the precursor to § 3729(a)(1) and contains the now-familiar presentment language. The conclusion that my colleagues draw from this is that § 3729(a)(2) — whose precursor is the second clause of the sentence, which unlike the first contains no reference to presentment — can "only be read in conjunction with" the earlier presentment clause. Op. at 19. But if, as my colleagues apparently intend, "in conjunction with" means "to incorporate," this reading makes sense only if the clauses of the pre-1982 version of the FCA were intended to largely duplicate each other. And they were not.

The multiple clauses of the pre-1982 version were not intended to repeatedly restate the same concept in different words, but rather to encompass the various ways by which a

person could fraudulently obtain government funds.[9] As the Supreme Court put it, "the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Neifert-White*, 390 U.S. at 231-32. This view is supported by the sentence's multiple uses of the disjunctive "or," which indicate that subsection (a)(2) should be read in "disjunction" rather than "conjunction" with subsection (a)(1), and by the "rule against superfluities" cited by the court, Op. at 17, which bars a reading that would have one of several distinct clauses do all the necessary work. *See Hibbs v. Winn*, 124 S. Ct. 2276, 2286 (2004); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

To support its novel incorporation theory, the court contends that the reference to "such claim" in subsection (a)(2)'s precursor clause[10] "was a shorthand reference to the claim already identified in the current subsection (a)(1) — that is, a claim that would be presented or caused to be presented to the United States." Op. at 19. But, the pre-1982

9. The court is thus wrong to say that my interpretation "embrace [s] a reading of (a)(2) that would render the plain language of (a)(1) largely meaningless." Op. at 15; *see id.* at 20. Moreover, as the government suggests, "there may be acts that fall within the scope of subsection (a)(1), but do not fall within the scope of subsection (a)(2)" in light of the fact that (a)(1) proscribes "false or fraudulent claim [s]," 31 U.S.C. § 3729(a)(1), while (a)(2) deals with certain "false record[s] or statement[s]," *id.* § 3729(a)(2). United States Suppl. Br. at 6.

10. *See* 31 U.S.C. § 231, cl. 2 (1976) (making liable any person "who, for the purpose of obtaining . . . payment or approval of *such claim*, makes . . . any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry") (emphasis added).

version of the FCA does not use the court's syntax: "a claim that would be presented." To the contrary, rather than use the word "presents" as a way to *describe* a claim, the pre-1982 statute uses it to describe something *done to* a particular kind of claim. And what kind of claim? The answer is: a false "claim upon or against the Government of the United States" in the precursor to subsection (a)(1),[11] and a "false or fraudulent claim" in the current version.[12] Those are the phrases that are the logical referents for "such claim," and neither contains a reference to presentment.[13]

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11. *See* 31 U.S.C. § 231 (1976) ("Any person . . . who [1] shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, *any claim upon or against the Government of the United States*, . . . knowing such claim to be false, fictitious, or fraudulent, or who, [2] for the purpose of obtaining or aiding to obtain the payment or approval of *such claim*, makes, uses, or causes to be made or used, any false bill. . . .") (emphasis added).

12. *See* 31 U.S.C. § 3729(a)(1) (making liable any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . *a false or fraudulent claim* for payment or approval") (emphasis added).

13. Nor is the court correct in saying that "legislative history . . . explains why the word 'such' disappeared from the statute," Op. at 19 — at least not in any way helpful to the court's interpretation. The single sentence that the court relies on merely says: " 'The word "such" is [no longer] used as a demonstrative adjective.' " *Id.* (quoting H.R.Rep. No. 97-651, at 3). That is description, not "explanation." Indeed, if anything, it is a description that supports the reading argued for in the above paragraph. After 1982, subsection (a)(2) no longer modified "claim" with "such" as in its precursor clause, and instead substituted the specific adjectival phrase that Congress had intended: "a false or fraudulent" claim. 31 U.S.C. § 3729(a)(2).

It is also important to remember that the history of the False Claims Act did not end in 1982. Whatever meaning "such claim" had prior to 1982, and whatever Congress intended by eliminating "such" in that year, the new definition of "claim" in the 1986 Amendments eliminates any reason a reader of subsection (a)(2) might have to refer to subsection (a)(1) to understand the meaning of the term. And that definition contains no reference to presentment. *See* 31 U.S.C. § 3729(c). In short, whatever comfort the court derives from the pre-1982 history of the FCA grows cold after 1986. *See Lamie*, 124 S. Ct. at 1030 ("The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes.") (internal citation omitted).

Finally, the court relies on "scholarly commentary" to support the "proposition that subsection (a)(2) harkens back to (a)(1), and that the latter requires presentment." Op. at 20 (citing BOESE § 2.01[B], at 2-21). But the "practitioner's" guide, BOESE at i, that the court cites adds nothing to its argument. While the guide does include the phrase, "a claim [must] be presented to the United States," in a list of the elements of subsection (a)(2), *see id.* at 2-21, it does not cite a single case or offer a single argument in support of that proposition. The court's opinion must stand or fall on its own.

III

To this point, the analysis has principally proceeded by examining § 3729(a) in isolation. But "words of a statute must be read in their context and with a view to their place

in the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks omitted), and here that context includes consideration of § 3729(c). In 1986, Congress amended the FCA by adding that subsection, which contained a new and comprehensive definition of the word "claim":

> For purposes of this section, "claim" includes any request or demand . . . for money or property *which is made to a contractor, grantee, or other recipient* **if** the United States Government provides any portion of the money or property which is requested or demanded, **or if** the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (italics and bolding added).

This definition plainly reaches not only those cases in which the grantee pays out money and then gets reimbursed by the government (the second "if" clause), but also those where "the United States Government provides any portion of the money" requested (the first "if" clause). The definition does require that a request or demand be made to the grantee, but does not mention re-presentment to the government. Indeed, such a re-presentment requirement is counter-intuitive with respect to the cases covered by the first "if" clause. Unlike the case in which a grantee advances its own funds and then seeks federal reimbursement, when the government provides the grantee with federal funds and the grantee then disburses them upon receipt of a contractor's

bill, it is unlikely that the grantee would have any reason to re-present that bill to the United States. Accordingly, the government contends that a re-presentment requirement would "render[ ] the first 'if' clause meaningless," United States Br. at 13, contravening the "rule against superfluities," *see* Op. at 17.

In response, the court accuses the government of "rhetorical sleight of hand" by equating "the present-tense 'provides' in the statute with the past-tense 'has provided' in the argument." *Id.* at 7. I disagree. In common parlance, it does not change the tense of "provides" to say that the government "provides" Amtrak with the funds it uses to pay contractors who later submit claims to Amtrak. Indeed, the court might be charged with some tense-shifting of its own, effectively transforming "provides" into the future tense by reading the first "if" clause as attaching liability only: "if the Government *provides* the funds to the grantee *upon presentment of a claim* to the Government." *Id.* (emphasis in original). Since in the real world these events do not transpire simultaneously, the court's contention that liability attaches only if the government provides the funds to the grantee "*upon* presentment of a claim" must mean "*after* presentment of a claim," thus effectively transforming "provides" into the future-tense "will provide." Such a transformation is particularly suspect in the context of § 3729(c), since its second "if" clause shows that Congress knew how to use that verb form when it wanted to. *See* 31 U.S.C. § 3729(c) ("if the Government *will* reimburse such contractor . . .") (emphasis added).

The primary problem with the court's theory is not tense transformation, however, but the insertion of extra words into the statute. Subsection (c)'s first "if" clause does not state, as the court does, that "False Claims Act liability will attach if the Government provides the funds to the grantee *upon presentment of a claim to the Government*." Op. at 7 (emphasis added). Rather, it simply defines claim as a "request or demand ... to a contractor, grantee, or other recipient" — the phrase "presentment of a claim to the Government" is not to be found. And as the old canon says, "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29, 118 S. Ct. 285, 289-90, 139 L.Ed.2d 215 (1997); *see Lamie*, 124 S. Ct. at 1032. Or, as the Supreme Court put it more pithily in *United States v. Naftalin*: "The short answer is that Congress did not write the statute that way." 441 U.S. 768, 773 (1979).

IV

I now turn to the legislative history of the 1986 Amendments. Although the court fires off an array of canons to preclude such inquiry, all refer to situations in which the statutory text is plain and unambiguous.[14] But, as is readily

14. *See* Op. at 8-9 (citing *Lamie*, 124 S. Ct. at 1030 ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.") (internal quotation marks omitted); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (stating that courts should "not resort to legislative history to cloud a statutory text that is clear"); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.")).

apparent, neither § 3729(a)(2) nor § 3729(c) mentions the word "presentment" in any of its variations. And whatever one may think of the arguments that can be made from the actual text, no one can say the False Claims Act "unambiguously" imposes a presentment requirement for liability under subsection (a)(2). Counsel for Bombardier rightly conceded as much at oral argument. Oral Arg. Tr. at 29-30. Accordingly, reference to the legislative history is appropriate. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984).

Once the legislative history is consulted, any residual uncertainty about whether to read a presentment requirement into the statute disappears. As this court recognized in *Yesudian*, the purpose of the new definition of "claim" added in 1986 was to "'clarif[y] that the statute permits the Government to sue under the False Claims Act for frauds perpetrated on Federal grantees, including States and other recipients of federal funds.' " 153 F.3d at 737 (quoting S. Rep. No. 99-345, at 21). The Senate Judiciary Committee stressed that it did not matter whether the claim was made to a government employee or to a grantee. "*[A] false claim is actionable*," the Committee said, "*although the claims or false statements were made to a party other than the Government*, if the payment thereon would ultimately result in a loss to the United States." S. Rep. No. 99-345, at 10 (emphasis added). And the House Judiciary Committee agreed: "*[C]laims or false statements made to a party other than the Government are covered* by this term if payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 99-660, at 21 (emphasis added).

Moreover, the "Senate Judiciary Committee indicated that the new subsection was inserted in response to earlier court holdings that 'a fraud against the grantee does not constitute a fraud against the Government of the United States' where 'once the United States has made the grant to the State . . . or other institution, it substantially relinquishes all control over the disposition of the money.' " *Yesudian*, 153 F.3d at 737 (quoting S.Rep. No. 99-345, at 21). The example cited by the Committee was *United States ex rel. Salzman v. Salant & Salant*, 41 F. Supp. 196 (S.D.N.Y. 1938), in which a district court dismissed a complaint that alleged the defendant had submitted false claims for payment to the Red Cross, because the Red Cross — although a recipient of federal funds — was neither the government nor a department thereof. S. Rep. No. 99-345, at 21. At the same time, the Committee approvingly cited cases akin to this one, where courts had held that "a false claim to the recipient of a grant from the United States . . . is a false claim to the United States." *Id.* at 10 (citing *United States ex rel. Davis v. Long's Drugs*, 411 F.Supp. 1144 (S.D. Cal. 1976)). Thus, to read the False Claims Act as requiring presentment to the government "would leave intact those court opinions Congress seemingly intended to overrule," while overturning those that Congress cited with approval. *Yesudian*, 153 F.3d at 738.

The court does not, and cannot, dispute that requiring presentment leaves intact "some" of the opinions that Congress intended to overrule.[15] Yet, it contents itself with

15. *See* Op. at 10 (conceding that "Totten and the United States may be on firmer ground with respect to some of the . . . cases with which the Committee expressed displeasure").

the fact that requiring presentment does not leave intact one of the cases that Congress cited with disapproval, *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). Op. at 495. But while it is true that imposing a presentment requirement does not interfere with the overruling of *Azzarelli*, that is only because *Azzarelli* was a case that Congress wanted to overrule for a different reason: it had held that the FCA did not apply to grantees "where the Federal contribution is a fixed sum." S. Rep. No. 99-345, at 15. The fact that the court's interpretation can be squared with Congress' intentions regarding that single case does not square its interpretation with the legislative history of the 1986 Amendments.

Taking another tack, the court dismisses the import of the 1986 legislative history altogether, noting that the Senate Report was based on a version of the bill that did not yet include the provision that added the words "by the Government" to subsection (a)(2). *See* Op. at 20. As discussed in Part II, however, those words do not impose a requirement of *presentment* to the government. Nor is there any legislative history that suggests they do. Indeed, the history is entirely silent as to why the words were added, and it is simply not plausible that Congress, which had expressed its intent to clarify that the FCA covers false claims to grantees, reversed itself without so much as a whisper. As the Supreme Court said in rejecting an analogous contention that Congress had repealed municipal liability in the 1986 Amendments, "it is simply not plausible that Congress intended" to make such a change "*sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims." *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 133-34 (2003).

Nor can my colleagues' dismissal of the clear legislative history find support in the arms of the inestimable Judge Friendly. Op. at 10 (citing HENRY J. FRIENDLY, BENCHMARKS 216 (1967)). In fact, the canon of construction propounded by the good judge supports the opposing view:

> [I]f an intent clearly expressed in committee reports is within the permissible limits of the language and no construction manifestly more reasonable suggests itself, a court does pretty well to read the statute to mean what the few legislators having the greatest concern with it said it meant to them.

FRIENDLY, at 216. In this case, the intent expressed in the committee reports is well within the permissible limits of the language, and there is no construction that is more reasonable. Accordingly, in Judge Friendly's view, this court would do "pretty well to read the statute to mean" what Congress said it meant. *Id.*

V

Finally, the court falls back on policy considerations to support its presentment requirement. Op. at 11-13. The court's arguments are flawed on their own terms. More important, the policies on which the court relies are not those of the Congress of the United States.

The court's policy analysis begins with the contention that an "interpretation that would advance the statute's general purposes to a greater extent" should not "always prevail over one that would both advance the same ends — though to a slightly lesser extent — and have fewer drawbacks." Op. at 11. This is fine as canons go, but only if *Congress* has indicated that it would be satisfied if its ends were advanced to "a slightly lesser extent" than the face of the statute suggests. And only if the court's idea of a "drawback" is the same as the legislature's.[16] But those caveats are not satisfied here, where the statutory language includes no presentment requirement and the legislative history makes clear that Congress did not want one.

Next, the court identifies several "complications" that could flow from permitting recovery where there is fraud on a grantee, but no presentment to the government. Op. at12. The first such complication is that "extending False Claims Act liability here seems to result in quadruple liability for false claimants: a grantee could presumably bring suit and obtain a recovery for itself, in addition to the treble damages the Government and the relator divvy up under the Act." *Id.* But the premise of this argument is dubious. The FCA permits recovery only on behalf of the government, and only for "damages which the Government sustains." 31 U.S.C.

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16. *See Lamie*, 124 S. Ct. at 132 ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."); FRIENDLY, at 203 ("[A] court will 'do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy.' " (quoting *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946))).

§ 3729(a).[17] For the grantee also to bring suit successfully, it would have to rely on some other source of law. And it is pure speculation that such an unnamed (perhaps state common law) cause of action would permit a grantee duplicative recovery, rather than require allocation among the injured parties according to their injuries. Moreover, even if state law did permit such recovery, a mechanical presentment requirement would not obviate the court's concern.

The other main complication identified by the court is that, without a presentment requirement, "the potential reach of the Act" is "almost boundless," potentially stretching to "any false claim made to any college or university, so long as the institution has received some federal grants." Op. at 13.[18] This argument also fails. As noted, the FCA limits damages to those "which the Government sustains." 31 U.S.C. § 3729(a). Although determining whether the government has been damaged by fraud on a grantee may be

17. In addition to trebling the amount of the government's damages, the Act provides for the recovery of an additional amount, not less than $5,500 and not more than $11,000. *See* 31 U.S.C. § 3729(a); *see also* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub.L. No. 101-410, § 5, 104 Stat. 891 (Oct. 5, 1990); 28 C.F.R. § 85.3(a)(9).

18. The third asserted complication, that it would be "unclear how to apply the 'knowingly presents' element," if there were no "requirement of presentment to the Government," Op. at 12-13, may be relevant with respect to subsection (a)(1), but has no relevance to subsection (a)(2). As previously noted, the latter does not contain the "knowingly presents" language that causes the complication. *Compare* 31 U.S.C. § 3729(a)(1), *with id.* § 3729(a)(2).

difficult in some cases, in others it will not. Here, for example, the plaintiff alleges that the money was "paid out of [Amtrak's] capital budget which consists entirely of money[ ] received from the United States Government, that was specifically designated for capital expenditures." Dillon Decl. ¶ 5; *see id.* ¶ 7. As the government describes the current state of the record, "it is the United States that provided much, if not all, of the funding for the projects with respect to which the alleged fraud here was committed, and it is the United States Government that will bear much, if not all, of any ensuing losses." United States Suppl. Br. at 11. Moreover, if traceability is a problem, it is a problem borne by the plaintiff, who must prove that the claim was "paid ... by the Government" in order to establish liability under § 3729(a)(2), and who must demonstrate the extent of the United States' losses in order to recover treble damages under § 3729(a).

In any event, there is no evidence that Congress shares the policy concerns identified by the court. To the contrary, far from worrying that the False Claims Act might extend too far in covering fraud on grantees, Congress insisted that "a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States." S. Rep. No. 99-345, at 10. And it sought to ensure that "a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." *Id.*

Appendix A

The Supreme Court has long recognized the breadth of Congress' concern in enacting the FCA, noting that "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.' " *Cook County*, 538 U.S. at 129 (quoting *Neifert-White*, 390 U.S. at 232). As a consequence, "[i]n the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil." *Neifert-White*, 390 U.S. at 232. And, in language that is a particularly apt rejoinder to the contention that a re-presentation requirement is needed to rein in the Act's potential reach, the Court has emphasized that federal funds granted to third parties "are as much in need of protection from fraudulent claims as any other federal money, and *the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution.*" *Marcus*, 317 U.S. at 544 (emphasis added).

Indeed, if there are policy concerns that should be taken into account in choosing between possible interpretations of the FCA, they are the ones outlined in the preceding two paragraphs, because they are the ones that Congress itself expressed. And measured by those concerns, it is the interpretation that the court adopts today that should give us pause. The consequence of today's ruling is a dramatic cutback in the federal government's ability to protect itself against false claims on federal grant money. Where a grantee receives federal money in advance and then pays its contractors directly — without the federal government micro-

managing the program by insisting on receiving and approving every invoice before payment — the FCA will no longer provide an avenue to recover for false claims. And as this case makes clear, the court's ruling applies even to an entity like Amtrak: a "publicly-funded operation," H.R.Rep. No. 105-251, at 21 (1997), that receives almost $1 billion dollars in federal grant money annually, *see* 49 U.S.C. § 24104(a),[19] and that paid the defendants in this case out of federal funds that were specifically provided for the contract at issue, *see* Am. Compl. ¶ 43; Dillon Decl. ¶ 5. The removal of the protection of the False Claims Act in these circumstances is far more than a mere "complication."

VI

The United States charges that the interpretation the court adopts today will "significantly restrict[ ] the reach of the False Claims Act in a manner than Congress did not intend, withdrawing False Claims Act protection with respect to a broad swath of false claims inflicting injury on the federal fisc." United States Br. at 9. The United States is right. If that interpretation were required by the statutory language, we would of course be required to adopt it nonetheless. But the court's interpretation is neither compelled by nor consistent with the language of 31 U.S.C. § 3729(a)(2) and (c). I therefore respectfully dissent.

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19 *See also* S.Rep. No. 105-85, at 2 (1997) ("Since 1971, . . . Amtrak has received more than $20 billion in Federal funding."); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 385 (1995) (noting that Congress subsidizes "Amtrak's perennial losses").

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED SEPTEMBER 3, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-0657 (RWR)

United States *ex rel* EDWARD L. TOTTEN,

Plaintiff,

v.

BOMBARDIER CORP., et al.,

Defendants.

MEMORANDUM OPINION

Edward L. Totten filed this *qui tam* action[1] alleging that Bombardier Corporation ("Bombardier") and Envirovac, Inc. ("Envirovac") submitted false claims to the National Railroad Passenger Corporation ("Amtrak") in violation of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733 (2000). Defendants have moved to dismiss plaintiff's amended complaint arguing, among other things, that plaintiff failed to allege that defendants either submitted the allegedly false claims to the federal government or caused them to be so

1. The United States declined to intervene. *See* 31 U.S.C. § 3730(b)(2).

submitted. Because plaintiff has failed to allege that the allegedly false claims were submitted to the federal government, his FCA claims fail and defendants' motion to dismiss will be granted.[2]

BACKGROUND

The background of this case is set forth fully in the prior opinion issued by United States District Judge Joyce Hens Green, *Totten v. Bombardier Corp.*, 139 F.Supp.2d 50, 51 (D.D.C.2001), and in the opinion issued by the United States Court of Appeals for the District of Columbia Circuit remanding the case for further consideration, *Totten v. Bombardier Corp.*, 286 F.3d 542, 544 (D.C.Cir.2002). Briefly, plaintiff was an engineer employed by Amtrak. Amtrak contracted with Bombardier to provide passenger rail cars, and Bombardier contracted with Envirovac to provide the toilet systems for those rail cars. Plaintiff alleges that the toilet systems provided by defendants did not satisfy the requirements of the contract specifications, that defendants knew that the toilet systems did not comply with the specifications, and that defendants submitted invoices for payment in which they warranted that the systems were in compliance with the contractual requirements. Plaintiff also alleges that Amtrak received federal funds that were subsequently used to pay the false claims submitted by defendants. Based on these allegations, plaintiff asserts two claims under the FCA.

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2. Plaintiff does not oppose dismissal of his wrongful termination claim. *See* Plaintiff's Opposition to Motions to Dismiss, p. 30.

Appendix B

DISCUSSION

Defendants have moved to dismiss plaintiff's amended complaint. In considering a motion to dismiss for failure to state a claim, the court must accept all the allegations in plaintiff's complaint as true and construe them in the light most favorable to plaintiff. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1027 (D.C.Cir.1997). On a motion to dismiss for failure to state a claim, "[c]ourts accept plaintiffs' allegations of fact, not their conclusions of law." *Taylor v. Federal Deposit Insurance Corp.,* 132 F.3d 753, 762 (D.C.Cir.1997). "Dismissal under Rule 12(b)(6) is proper when, taking the material allegations of the complaint as admitted, and construing them in plaintiff's favor, the court finds that the plaintiff has failed to allege all the material elements of his cause of action." *Weyrich v. The New Republic, Inc.,* 235 F.3d 617, 623 (D.C.Cir.2001) (internal citations omitted).

The FCA imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). The language of § 3729(a)(1) states plainly that the alleged false claim must have been presented to the federal government itself. Section 3729(c), however, defines "claim" to include demands made to a grantee "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

Appendix B

The legislative history of the FCA indicates that Congress enacted the current definition of "claim" in 1986 to permit FCA lawsuits where the alleged fraud is against federal grantees. *See United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 737 (D.C.Cir.1998). It appears, however, that Congress "did not quite achieve the objective of making all false claims to grantees subject to the [FCA]." *Id.* at 738; *see also Totten*, 286 F.3d at 554 (concurrence). What Congress created was a cause of action where a "defendant 'knowingly present[s], or cause[s] to be presented, to an officer or employee of the United States . . . a false or fraudulent . . . request . . . to a [contractor], grantee[, or other recipient] if the United States Government provides any portion of the money . . . which is requested . . , or if the Government will reimburse [the] . . . grantee . . . for any portion of the money . . . which is requested.'" *Yesudian*, 153 F.3d at 738.

Preferable though it may be for there to be a cause of action "to cover claims presented to grantees, but 'effectively' presented to the United States," *id.*, Congress nevertheless did not remove the unambiguous language requiring presentment to the United States. It would have been possible, and may still be possible, for Congress to do so by amending § 3729(a)(1) to cover any defendant who knowingly presents, or causes to be presented, to an officer or employee of the United States Government "or to a contractor, grantee, or other recipient covered by § 3729 subsection (c)," a false or fraudulent claim.[3] Since the statute's language is so plain,

3. *Yesudian* suggested that if § 3729(a)(1) were to cover false claims submitted to grantees, perhaps it should not apply to all (Cont'd)

however, I hesitate to resort to legislative history even though the history suggests a Congressional intent different from the plain language that appears in the statute.[4] *See Davis v. Michigan Department of Treasury,* 489 U.S. 803, 808-09 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *Cole v. Burns International Security Services,* 105 F.3d 1465, 1472 (D.C.Cir.1997) (citing *Davis*).

A "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." *American Radio Relay League, Inc. v. Federal Communications Comm'n,* 617 F.2d

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(Cont'd)

grantees. *Yesudian,* 153 F.3d at 738. It is unclear whether Amtrak would meet *Yesudian'* s criteria which would measure how substantial the federal nexus was to the grantee. Although the percentage of Amtrak's money coming from the federal government was 34% in 1996, 74% in 1998, and 51% in 1999 (*see* Plaintiff's Opposition to Motion to Dismiss, at 24), unlike in *Yesudian,* there is no evidence in the record that the grantee here received funds through annual Congressional appropriations; had any ability to make purchases through the General Services Administration; was required by statute to be inspected at least once per year by the federal government; or was required by statute to submit annual statements of income and expenses. *Cf. Yesudian,* 153 F.3d at 739.

4. The *Yesudian* court did examine the legislative history in discussing the issue of whether submitting a false claim to a federal grantee satisfies § 3729(a)(1) without evidence that the claim was resubmitted to the federal government. 153 F.3d 737-39. However, the court declined to resolve that issue and rested its decision on other grounds. *Id.* at 739.

875, 879 (D.C.Cir.1980) (quoting 2A Sutherland Statutory Construction § 46.06, at 63 (4th ed. C. Sands 1973)). Applying this rule to § 3729, I construe it to require that a false claim, defined to include one made to a grantee under certain circumstances, must still be presented at some point to a federal officer or employee.

Plaintiff alleges that the allegedly false claims in this case were presented to and paid by Amtrak, not that the false claims were presented to any federal officer or employee. Amtrak is not a "department, agency, or instrumentality" of the federal government. *See Totten,* 286 F.3d at 544; 49 U.S.C. § 24301(a). As a result, plaintiff has failed to allege an essential element of his FCA claims—that defendants presented the allegedly false claims for payment, or caused them to be presented, to an officer or employee of the United States Government.

CONCLUSION

The liability provision of the FCA requires that the defendant have submitted the allegedly false claims to the federal government or have caused them to be so submitted. Plaintiff has failed to allege that defendants submitted false claims to the federal government or caused Amtrak to submit false claims to the federal government. For this reason, plaintiff's FCA claims fail and defendants' motions to dismiss will be granted. A final order accompanies this Memorandum Opinion.

SIGNED this 3rd day of September, 2003.

s/ Richard W. Roberts
RICHARD W. ROBERTS
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 8, 2004

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 03-7128 **September Term, 2004**

98cv00657

Filed On: December 8, 2004 [864306]

United States of America, *ex rel* Edward L. Totten,

Appellant

v.

Bombardier Corporation and Envirovac, Inc.,

Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards,* Sentelle, Henderson,** Randolph, Rogers, Tatel,** Garland,** and Roberts, Circuit Judges

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* Circuit Judge Edwards did not participate in this matter.

** Circuit Judges Henderson, Tatel, and Garland would grant the petition for rehearing en banc.

Appendix C

ORDER

Appellant's petition for rehearing en banc and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Nancy G. Dunn
Deputy Clerk

APPENDIX D — STATUTORY PROVISIONS

31 U.S.C. § 3729

§ 3729. False claims

(a) Liability for Certain Acts.— Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,500 and not more than $11,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after

the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and Knowingly Defined.— For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim Defined.— For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption From Disclosure.— Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.— This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

Appendix D

31 U.S.C. § 3730

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General.— The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The

Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to Qui Tam Actions.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the

proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person

initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in

camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

Appendix D

(d) Award to Qui Tam Plaintiff.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been

1. So in original. Probably should be "General".

necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to

litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in

a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government Not Liable for Certain Expenses.— The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant.— In civil actions brought under this section by the United States, the provisions of section 2412 (d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and

2. So in original. Probably should be "General".

conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Appendix D

31 U.S.C. § 3731

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

Appendix D

31 U.S.C. § 3732

§ 3732. False claims jurisdiction

(a) Actions Under Section 3730.— Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims Under State Law.— The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

Appendix D

31 U.S.C. § 3733

§ 3733. Civil investigative demands

(a) In General.—

(1) Issuance and service.— Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony. The Attorney General may not delegate

the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected Material or Information.—

(1) In general.— A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws.— Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery

pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; Jurisdiction.—

(1) By whom served.— Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries.— Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

Appendix D

(d) Service Upon Legal Entities and Natural Persons.—

(1) Legal entities.— Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons.— Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of Service.— A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary Material.—

(1) Sworn certificates.— The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials.— Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may

prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories.— Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

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(h) Oral Examinations.—

(1) Procedures.— The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present.— The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government,

any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken.— The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony.— When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill,

cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. — The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness.— Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

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(7) Conduct of oral testimony.—

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances.— Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of Documents, Answers, and Transcripts.—

(1) Designation.— The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

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(2) Responsibility for materials; disclosure.—

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

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(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings.— Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to

be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

> **(A)** any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or
>
> **(B)** no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law

investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians.— In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material,

answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial Proceedings.—

(1) Petition for enforcement.— Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. —

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial

district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

> **(i)** within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or
>
> **(ii)** within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of

this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties.— At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued

under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction.— Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure.— The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure Exemption.— Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions.— For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

No. 04-1199

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.* EDWARD TOTTEN,

Petitioner,

v.

BOMBARDIER CORPORATION and ENVIROVAC, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

The question presented is whether the United States Court of Appeals for the District of Columbia Circuit erred in ruling that the False Claims Act, 31 U.S.C. § 3729 *et seq.*, does not apply to allegedly false claims for payment submitted by contractors to Amtrak because they were never "presented to an officer or employee of the United States for payment or approval," as required in the statute.

CORPORATE DISCLOSURE STATEMENT

Respondents submit that the Corporate Disclosure Statement included in the Petition should be modified to reflect that Evac International Ltd (the parent company of Envirovac Inc.) is a wholly-owned subsidiary of Zodiac International SA, which, in turn, is a wholly-owned subsidiary of Zodiac SA, a French public limited company. Zodiac SA is listed on the Paris Stock Exchange.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

In addition to Petitioner's statement of opinions below, the Court's attention is also directed to the earlier decision in this case by the United States Court of Appeals for the District of Columbia Circuit, 286 F.3d 542 (D.C. Cir. 2002), reproduced at App. A, in which the Circuit Court granted Petitioner leave to replead. (*"Totten I"*).

JURISDICTION

Respondents do not contest this Court's jurisdiction to review this petition under 28 U.S.C. § 1254(a). However, Respondents assert that Petitioner has misstated the portion of Supreme Court Rule 10(c) upon which he relies to seek a writ of certiorari. Contrary to Petitioner's statement, Supreme Court Rule 10(c) says nothing about basing certiorari on an alleged conflict with Congressional intent. Because, as set forth below, the circuit court's decision does not conflict with any decisions of this Court or other circuits, a grant of certiorari is not appropriate in this case.

STATEMENT OF THE CASE

This case is a *qui tam* action under the False Claims Act arising out of two contracts between the National Railroad Passenger Corporation ("Amtrak") and Bombardier Corporation ("Bombardier") to purchase passenger rail cars. Petitioner, a discharged employee of Amtrak, filed a complaint on March 18, 1998, alleging that Respondents Bombardier and its subcontractor, Envirovac, Inc. ("Envirovac"), delivered passenger train toilets that failed to meet contract specifications. Essentially, Petitioner has alleged that Respondents violated the False Claims Act ("FCA") by falsely certifying to Amtrak that the equipment complied with contract specifications.

This case has a lengthy history. The original complaint was dismissed at the district court, but the circuit court reversed and granted leave to replead. *United States ex rel. Totten v. Bombardier Corp. and Envirovac, Inc.*, 286 F.3d 542 (D.C. Cir. 2002) ("*Totten I*"). The amended complaint was also dismissed by the district court and the dismissal was affirmed by the circuit court. *United States ex rel. Totten v. Bombardier Corp. and Envirovac, Inc.*, 380 F.3d 488 (D.C. Cir. 2004) ("*Totten II*"). Subsequently, the circuit court denied *en banc* review. *Id.* Although it has appeared in this case as an *amicus,* the government has consistently declined to intervene as a party, leaving the *qui tam* Petitioner to pursue the action on his own.

The issue in this case is whether liability under the FCA can be established where no false or fraudulent claim for payment or approval has knowingly been presented or caused

to be presented to an officer or employee of the United States Government. 31 U.S.C. § 3729(a).

In all the years this case was pending below, Petitioner never alleged that Respondents presented, or caused to be presented, any false claims to any entity other than Amtrak, much less to an officer or employee of the United States Government. Instead, Petitioner has merely alleged that Amtrak opted to use some federal funds to repay principal and interest on loans obtained to finance purchase of the trains. Totten Pet., at 3. Petitioner, nevertheless, asks this Court to ignore the plain language of the FCA requiring federal presentment, based on a contorted interpretation of the statute and a misplaced reliance on legislative history.

The circuit court's ruling refusing to write federal presentment out of the FCA is fully consistent with the prior decisions of this Court and of other circuit courts. Moreover, it simply interprets the statute in accordance with its plain meaning. Any suggestion that this ruling limits the applicability of the FCA to federal grantees is unfounded. To the extent that a federal agency seeks to apply FCA coverage to a grantee of federal funds, the agency need only incorporate federal presentment requirements in the grant programs and contracts.

REASONS FOR DENYING THE WRIT

1. There is No Conflict With Earlier Decisions of This Court or Any Circuit Court

The District of Columbia Circuit Court's decision does not conflict with any precedents of this Court, or with those of any other circuit court. Recognizing this flaw, Petitioner instead tries to argue that such a conflict exists because a few courts interpreted an "earlier version" of the FCA (prior to the 1986 amendments) "broadly to include claims presented to grantees and intermediaries." Totten Pet., at 3-9. He then suggests that Congress must have adopted this construction in enacting the 1986 amendments. But, in cobbling his argument, Petitioner pointedly ignores the critical element present in each of those earlier cases, namely, the claim made upon the grantee was ultimately presented to the federal government for payment, approval or reimbursement. Thus, his petition must fail.

In *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943) (cited at Totten Pet., at 4-8), this Court addressed issues related to payments by local governments to contractors on federal P.W.A. projects. The *Marcus* Court explicitly recognized that federal presentment was involved when it stated it was a prerequisite to payment that estimates be "filed, transmitted to, and approved by, the P.W.A. authorities." *Id.* As the *Marcus* Court went on to note, "While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on [federal government] forms which showed the government's

participation in the work and called attention to other federal statutes prohibiting fraudulent claims." Indeed, "[t]he government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive." *Id.*, 317 U.S. at 543.

Underscoring the distinction between *Marcus* and the present case, the *Totten II* majority cited *Marcus* as an example of how the government could have structured its alleged funding to Amtrak, in order to place federally-funded payments to Amtrak within the FCA's reach. *See Totten II*, 380 F.3d at 502, n.9 ("[T]he Government is of course free to structure its grants in such a way as to require presentment and thereby trigger coverage under the False Claims Act, and often does so.") (citing *Marcus*, internal citation omitted).

Nor do the two Circuit Court decisions cited by Petitioner conflict with the ruling below. *See Murray & Sorrenson v. United States*, 207 F.2d 119, 121 (1st Cir. 1953) (supplier's inflated bids were, in turn, submitted by the contractor "to an officer of the United States Navy" for approval - and, upon the order being filled by the supplier, "the Navy Department paid the contractor and the contractor paid the supplier"); *United States v. Lagerbusch*, 361 F.2d 449, 449 (3d Cir. 1966) (private contractor was operating a United States government installation on a cost plus contract under which the government paid or reimbursed the contractor for all operating costs, including the sums fraudulently obtained by the defendant).

In short, the cited authorities are perfectly consistent with the ruling below. In each, FCA liability was found where the federal government paid, approved or reimbursed the claim after presentment to an officer or employee of the federal government.

To the extent that Congress should be viewed to have adopted any court's pre-1986 construction of the FCA when it passed the 1986 Amendments, Respondents should prevail: nothing about pre-1986 interpretations of the FCA is inconsistent with the ruling by the circuit court in this case. Thus, no basis exists to grant the petition for review.

2. Amtrak Is Not the Government

Petitioner next contends that even if presentment is required, making a false claim upon Amtrak is tantamount to making a claim upon an officer or employee of the federal government. Totten Pet., at 9-13. Petitioner states that before December 1997, Amtrak was a mixed-ownership government corporation and that, since that time, it has received substantial federal subsidies. Therefore, he argues that any claim presented to Amtrak should be considered a claim to the United States.

This point has twice been rejected by the Circuit Court below based on the very statute creating Amtrak. *See* 49 U.S.C. § 24301(a)(3). As stated in *Totten I*, "[s]ince its inception, the statutes governing Amtrak have indicated that the railroad is . . . not . . . a department, agency, or instrumentality of the federal government." 286 F.3d at 544 (citations and internal

quotes omitted). "This status continues to the present day." *Id.* (citing 49 U.S.C. § 24301(a)). Moreover, all the judges on *Totten II* agreed that Amtrak is not "the government" for FCA purposes. *See Totten II*, 380 F.3d at 481 and 498 ("We are apparently in agreement with the dissent that Amtrak is not 'the Government' for False Claims Act purposes.").

Petitioner's argument is based on an erroneous reading of *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995). *Lebron* held only that, for purposes of determining Amtrak's status with respect to the *constitutional* rights of citizens affected by its actions, the courts may make a final determination as to Amtrak's status as a governmental entity. Where, as here, no constitutional rights are implicated, *Lebron's* holding does not apply. In fact, *Lebron* actually confirms that the statutes governing Amtrak - which provide that Amtrak is *not* a department, agency or instrumentality of the federal government - are dispositive of statutory claims: "Section 541 is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control." As *Totten II* held, Petitioner "offers no reason, and we can think of none, why False Claims Act coverage is not a matter 'within Congress's control'." *Totten II*, 380 F.3d at 492.

Petitioner's remaining significant authority, *Rainwater v. United States*, 356 U.S. 590 (1958), is equally inapplicable. *Rainwater* held that presentment of a claim to the Commodity Credit Corporation (the "CCC") was a claim against the United States Government. But, the CCC was "an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of

the Secretary of Agriculture" (*Id.* at 591) (internal quotations and citations omitted), dispositive facts that Petitioner fails to mention. Moreover, "[a]ll of its officers and other personnel [were] employees of the Department of Agriculture." *Id.* Accordingly, the unremarkable holding in *Rainwater* – that presentment of a claim to a government agency, which is comprised entirely of government employees, suffices under the FCA – has no application here.

3. The Circuit Court Decision Merely Applied The Plain Meaning of the Statute

a. The Plain Language of § 3729 Requires Presentment

As this Court has repeatedly stated, "[t]he plain meaning of [a] statute decides the issue presented." *Fed. Energy Regulatory Comm'n v. Martin Exploratory Mgmt. Co.*, 486 U.S. 204, 209 (1988). Here, the relevant liability section of the FCA requires that a person "knowingly present[], or cause[] to be presented, *to an officer or employee of the United States Government* . . . a false or fraudulent claim for payment or approval." 31 U.S. C. § 3729(a)(1) (emphasis added). Petitioner nowhere alleges in his Amended Complaint that a claim was, in fact, presented to "an officer or employee of the United States Government." Perforce, as the Circuit Court recognized, he has failed to state a claim.

Instead, Petitioner contends that presentment to a government officer or employee is not always required. He premises this contention upon his interpretation of the

definition (rather than the liability) section of the Act, which provides that a "claim" includes any demand for money made to a grantee "if the United States Government provides any portion of the money" or "if the Government will reimburse such . . . grantee." 31 U.S.C. § 3729(c) (2005). Since this definition of the word "claim" "imposes no resubmission requirement on recipients of federal funds", he contends that presentment is unnecessary when a false claim is made upon a grantee.

This distorted interpretation would write the clear language of Section 3729(a)(1), *the liability section*, entirely out of the Act. Yet, that section's presentment requirement is unambiguous:

> **Liability for certain acts** -- Any person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government...a false or fraudulent claim for payment...is liable to the United States Government . . . .

31 U.S.C. § 3729(a)(1) (2005).

Moreover, the "claim" definition can be construed harmoniously with the presentment requirement. Even if a claim is in the first instance presented to a grantee, it is only actionable if that claim is ultimately presented to a federal official. This interpretation is fully in accord with the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no

clause, sentence, or word shall be superfluous, void or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citations omitted). *See also Duncan v. Walker*, 533 U.S. 167, 174 (2001).

The *Totten II* majority agreed:

> It is quite easy to square the language of Section 3729(c) - including *both* "if" clauses - with the presentment requirement in Section 3729(a)(1).....Nothing about the language of subsection (c) requires ignoring that of subsection (a)(1) to make sense of the statute. Indeed, Petitioner and the United States never connect the dots in their argument based on subsection (c). Whatever that argument may show about what constitutes a "claim," it does not respond to the plain requirement of subsection (a)(1) that, to be actionable under the False Claims Act, any such claim must be presented to an officer or employee of the United States Government.

Totten II, 380 F.3d at 493 (footnote omitted). This reasoning confirms that of Judge Randolph, who stated in his concurring opinion in *Totten I*, "[i]t is true that § 3729(c) defines 'claim' to include claims submitted to federal grantees. But it is equally true that no matter how 'claim' is defined, subsection (a)(1) requires the alleged false claimant to present it (or cause it to be presented) to a federal officer or employee." *Totten I*, 286 F.3d at 553-554. Simply put, if Congress wanted to eliminate the

government presentment requirement, it could easily have amended § 3729(a)(1) "to provide that claims be presented to the Government *or a grantee or recipient of Government funds.*" *Totten II*, 380 F.3d at 496 (emphasis in original). Congress did not do so, and Petitioner's tortured construction should thus be rejected.

Furthermore, any argument that only an unrestricted reading of the "claim" definition in subsection (c) will protect government funds from fraud, must be rejected. As this Court has stated, "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)) (ellipses in *Lamie*). The *Totten II* majority stated that there are good reasons for this rule, because a court's interpretation can often create new problems. It then cited three complications that "could flow from the proposed correction." *Totten II*, 380 F.3d at 496.

First, as Judge Randolph had noted previously in *Totten I*: "[E]xtending False Claims Act liability here seems to result in quadruple liability for false claimants: a grantee could presumably bring suit and obtain a recovery for itself, in addition to the treble damages the Government and the relator divvy up under the Act." *Totten II*, 380 F.3d at 496.

Second, authorizing suit on behalf of any entity to which a claim was not presented raises complicated questions in applying the statute's scienter requirement: if the claimant has told the grantee pertinent facts that would, in the absence of

such disclosure, make a claim fraudulent, it seems that the claimant has not "knowingly" presented a false claim *to the grantee*. In such a case, it is unclear how to apply the "knowingly presents" element when the government or a relator brings suit for claims made to the grantee, if there is no longer any requirement of presentment to the government. *Id.* This would raise an additional set of issues for court analysis and interpretation.

Third, a liberalized "effective" presentment approach that did not require actual presentment would make the potential reach of the Act almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received federal grants, as most of them do. Such an imprecise line of demarcation could be a prescription for more collateral litigation under the FCA. *Id.*

The FCA eliminates these potential complications through the presentment requirement. When presentment occurs, the government retains an ongoing interest in controlling the use of the disbursed federal funds. In that case, it is sensible to conclude that money in the hands of a grantee is still government property for purposes of the FCA. By contrast, where no government presentment occurs, the government's interest in the disbursed funds is not sufficient to merit FCA protection. Here, absent presentment to the government, disputes between Amtrak and other private entities properly should be addressed by ordinary contract and tort law, which provides ample remedies for any alleged claims.

It is not an exaggeration to say that, in the absence of a presentment requirement, any person or entity involved in any run-of-the-mill dispute with one of the millions of recipients of federal funds could find itself facing the onerous damages and penalties imposed by the FCA. If an FCA claim is viable in such a circumstance - where there is no claim presentment and where one need only allege that funds originated with the federal government - *qui tam* relators will surely attempt to capitalize on Petitioner's attempt to "federalize" ordinary contract and tort disputes.

b. Section 3729(a)(2) Also Requires Presentment

Petitioner further tries to argue that his action can proceed under § 3729(a)(2), which he interprets not to require any claim presentation to a federal government official. This argument is based on the position adopted by the dissent in *Totten II*. *Totten II*, 380 F.3d at 504.

Prior to 1982, presentment to the government was expressly required. In 1982, the statute was amended simply to divide a single cumbersome sentence in two - §§ 3729(a)(1) and (a)(2). The legislative history states that the purpose of the 1982 codification was only "to restate in comprehensive form, *without substantive change*, certain general and permanent laws related to money and finance and to enact those laws as Title 31, United States Code." H.R. Rep. 97-651 (1982), reprinted at 1982 U.S.C.C.A.N. 1895. Therefore, the separation of what are now subsections (a)(1) and (a)(2) is of no consequence, and the presentment requirement of (a)(1) must be read to apply with equal force to (a)(2).

In the 1986 amendments to the statute, when Congress added the definition of "claim" to subsection (c), it also inserted the phrase "by the Government" to subsection (a)(2) so that it read:

> Any person who knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved *by the Government*...is liable....

As the circuit court majority held, the addition of this phrase confirms that (a)(2) also requires presentment.

> The intended effect of adding "by the Government" [to Section 3729(a)(2) in 1986] at the same time as subsection (c) is fairly obvious: Congress was referring back to the presentment requirement of Section 3729(a)(1). And in so doing, Congress was reinforcing - rather than abandoning - the distinction between the Government and its grantees that might otherwise have been blurred by the addition of Section 3729(c).

Totten II, 380 F.3d at 499. The *Totten II* majority reached this decision after an exhaustive review of the provision's evolution. It began by noting that "[t]he parallel structure of (a)(1) and (a)(2)" is "no accident," since, prior to 1982, both provisions "were contained in one unwieldy sentence that had survived, with only minor modifications, since the Act's enactment in

1863." *Id.*, at 499-500. After tracking Congress' revisions of the statute over the past 100 years, the Court concluded, "The present Section 3729(a)(2), therefore, is the direct descendant of a clause that could only be read in conjunction with what is now Section 3729(a)(1)." The majority added that "[t]he proposition that subsection (a)(2) harkens back to (a)(1), and that the latter requires presentment, is supported in scholarly commentary on the False Claims Act." It then observed, "[t]he dissent's contrary conclusion – that subsection (a)(2) does not require any presentment that may be required under subsection (a)(1) – has tellingly little support." *Id.*, at 501.

Words added to a statute must be presumed to have meaning. *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 397 (1995) Further, a Court must avoid any construction that renders words in a statute meaningless. *Duncan*, 533 U.S. at 174; *Alaska Dept. of Envtl. Conservation v. Envtl. Protection Agency*, 540 U.S. 461, 489, n.13 (2004). Here, no construction favoring removal of the presentment requirement can be squared with the addition of the phrase "by the Government" and would render that phrase superfluous.

Furthermore, Petitioner's reading of subsection (a)(2) to avoid the presentment requirement would render (a)(1) largely meaningless. Allowing (a)(2) to swallow (a)(1) is problematic because it seems clear that (a)(2) is designed to be complementary to (a)(1) and to prevent those who only make false records or statements from escaping liability solely on the grounds that they did not themselves present the claim to the government. *Totten II*, 380 F.3d at 501.

Courts have uniformly recognized that subsection (a)(2) requires presentment. In *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676 (10th Cir. 1998), for instance, the Tenth Circuit held that "[t]o establish a claim under (a)(2), a person must demonstrate that (1) a 'claim' was *presented to the government* by the defendant, or the defendant 'caused' a third party to submit the 'claim,' (2) the claim was 'false or fraudulent,' (3) the defendant presented the claim knowing it was 'false or fraudulent,' and (4) the defendant made or used a false statement which the defendant knew to be false, and which was causally connected to the false claim." *Id.* at 682 (emphasis added).[1]

In short, as the evolution and language of the FCA makes clear, the false record provision can only be triggered where there is presentment of a false claim to the government for payment or approval.

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[1] Similarly, district courts have consistently held that a claim under the false record provision requires government presentment. *See United States ex rel. Harris v. Bernad*, 275 F. Supp. 2d 1, 6 (D.D.C. 2003) (holding that § 3729(a)(2) requires "that the defendant knowingly created a false record, used this record to create a claim, then submitted the claim (not the record) to the government"); *United States v. Intrados/Int'l Mgmt. Group*, 265 F. Supp. 2d 1, 8 (D.D.C. 2002) (holding that liability under (a)(2) would attach if defendant used false salary information "in a calculation and then incorporat[ed] [the resulting number] in an invoice, and subsequently submitt[ed] the invoice to the government for reimbursement"); *See also United States ex rel. Koch v. Koch Indus., Inc.*, No. 91-CV-763-K, 1999 U.S. Dist. LEXIS 16632, at * 13 (N.D. Okla. Sept. 28, 1999) (quoting the (a)(2) elements set forth in the *Aakhus* decision).

4. The Legislative History of the 1986 Amendments Does Not Address the Presentment Requirement

Petitioner places great reliance on the legislative history of the 1986 amendments to the FCA. As the *Totten II* majority held, however, "resort to legislative history is not appropriate in construing plain statutory language. When the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." *Totten II*, 380 F.3d at 494 (citations omitted); *Ratzlaf v. United States*, 510 U.S. 135, 147-8 (1994) (courts should not "resort to legislative history to cloud a statutory text that is clear"). As the *Totten II* majority held, the statutory language in this case is plain and resort to the legislative history unwarranted.

That said, the legislative history, in this instance, does not significantly advance Petitioner's cause. His reliance on the stated legislative intent to "overrule *Azzarelli* and similar cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees" (quoting S. Rep. No. 99-345, at 22 (1986), reprinted at 1986 U.S.C.C.A.N. 5266, 5287) is misplaced. In *United States v. Azzarelli Constr. Co.*, 647 F.2d 757 (7th Cir. 1981), the court held that because the federal funds at issue were part of a "fixed and determined yearly contribution" rather than an "open-ended federal expenditure program," the FCA did not apply. *Id.* at 761. In amending the FCA to overrule that decision, Congress sought to ensure that the fixed nature of a federal grant would be no bar to a claimant's liability. Nothing about that stated intention is inconsistent with the presentment requirement. In fact, *Azzarelli* itself involved the presentment of false claims to the

federal government. The payment program at issue clearly required the state to present to the government claims for reimbursement after it paid the contractor's fraudulent claims. *Totten II* 380 F.3d at 495.

Perhaps the most important aspect of the legislative history of the 1986 amendments, however, is what Congress did *not* say. The liability provision of the Act is short and contains only one basic requirement: presentment of a false claim to an officer or employee of the federal government. If Congress intended to rewrite that provision, surely it would have expressly said so; it did not. The absence of any such statement undermines the argument that Congress intended to remove the presentment requirement in § 3729. Indeed,

> if the overriding intent of Congress were in fact to delete the requirement that claims be presented to a Government officer or employee, Congress could readily have done just that – amend subsection (a)(1) to provide that claims be presented to the Government *or a grantee or recipient of Government funds*. But Congress did not touch (a)(1) at all in 1986. Congress proceeded quite elliptically if its intent were to eliminate the requirement of presentment to the Government in the case of claims against grantees.

Totten II, 380 F.3d at 495-6 (emphasis in original). As noted above, "the Government is of course free to structure its grants in such a way as to require presentment and thereby trigger

coverage under the False Claims Act, and often does so." *Id.*, at 502, n.9.

CONCLUSION

For the foregoing reasons, Respondents ask this Court to deny the Petition for A Writ of Certiorari.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 4, 2002 Decided April 16, 2002

No. 01-7071

United States of America, ex rel. Edward L. Totten,
Appellant

v.

Bombardier Corporation and Envirovac, Inc.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 98cv00657)

H. Vincent McKnight Jr. argued the cause for appellant. With him on the briefs was Peter J. Vangsnes.

Thomas M. Bondy, Attorney, U.S. Department of Justice, argued the cause as amicus curiae supporting appellant. With him on the brief were Roscoe C. Howard Jr., United States Attorney, Douglas N. Letter, Litigation Counsel, United States Department of Justice, and Colin C. Carriere, Counsel, National Railroad Passenger Corporation.

Mark R. Hellerer argued the cause and filed the brief for appellee Bombardier Corporation. Donald A. Carr entered an appearance.

Paul E. Lehner and Randall L. Mitchell were on the brief for appellee Envirovac, Inc. Barbara Van Gelder and Scott M. McCaleb entered appearances.

Before: Edwards and Randolph, Circuit Judges, and Williams, Senior Circuit Judge.

Opinion for the court filed by Circuit Judge Edwards.

Concurring opinion filed by Circuit Judge Randolph.

Edwards, Circuit Judge: Suspecting that his employer, the National Railroad Passenger Corporation ("Amtrak") was being defrauded by two companies with whom it had contract-ed to supply new rail cars with improved toilet systems, Edward Totten brought an action against these companies under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733 (1994). The District Court dismissed his suit, holding that, pursuant to a recent amendment to Amtrak's governing statute, the FCA could not be invoked with respect to federal money invested in the railroad. Totten now appeals this decision, and in so doing presents us with an issue of first impression regarding the extent to which doing business with Amtrak immunizes contractors from FCA liability.

In 1997, Congress enacted legislation which stated, in part, that Amtrak "shall not be subject to title 31." See Amtrak Reform and Accountability Act of 1997,

Pub. L. No. 105-134, § 415(d), 111 Stat. 2570 (Dec. 2, 1997) ("the Reform Act"), codified at 49 U.S.C.A. § 24301(a)(3) (2001). Because the FCA is included in title 31 of the U.S. Code, the District Court concluded that a suit by Totten against contractors doing business with the railroad would impermissibly make Amtrak "subject to" the FCA. We disagree. Instead, we hold that the Reform Act erects no per se bar preventing individuals from bringing FCA actions against those who make false or fraudulent claims implicating the federal funds invested in Amtrak. Neither the text nor the legislative history of § 24301(a)(3) compels a blanket liability exception for businesses serving Amtrak.

Accordingly, we reverse the judgment of the District Court and remand the case for further proceedings. On remand, Totten may amend his complaint, which presently is inadequate, in order to state a proper claim for relief under the FCA. The District Court indicated that it would have per-mitted such an amendment had it not interpreted the Reform Act as posing an insurmountable obstacle to Totten's suit. We agree that an opportunity to amend is permissible and appropriate.

In amending his complaint, Totten must state with particularity the circumstances surrounding the defendants' allegedly false claims, as required by Rule 9(b) of the Federal Rules of Civil Procedure. He must also aver that the defendants actually submitted false demands for payment, rather than merely non-conforming goods. That said, we express no view on the question left open by this court in *United States ex*

rel. Yesudian v. Howard University, 153 F.3d 731, 737-39 (D.C. Cir. 1998), concerning the relationship between subsections (a)(1) and (c) of 31 U.S.C. § 3729. Instead, we leave it to the District Court to determine, should the issue arise on remand, whether an FCA plaintiff may prevail against a defendant who submits a false "claim" to Amtrak, as that term is defined in § 3729(c), without evidence that the claim was ever submitted (or resubmitted) to the federal government. We will not venture to offer an answer to this difficult legal question on the record currently before us.

I. BACKGROUND

Congress created Amtrak in 1971 in order to stave off the threatened extinction of passenger rail service in the United States. *See* Rail Passenger Service Act of 1970, Public Law No. 91-518, 84 Stat. 1327 (Oct. 30, 1970); *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 453-55 (1985). Since its inception, the statutes governing Amtrak have indicated that the railroad is to be managed as a for-profit corporation, and not as a "department, agency, or instrumentality" of the federal government. *See generally Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383-86 (1994). This status continues to the present day. See 49 U.S.C.A. § 24301(a). As such, the railroad is generally exempt from those "statutes that impose obligations or confer powers upon Government entities." *Lebron*, 513 U.S. at 392 (holding that Amtrak is nevertheless subject to the constraints of the Constitution).

Until 1997, Amtrak was formally classified as a "mixed-ownership Government corporation," 31 U.S.C. § 9101(2)(A) (1983), and was therefore bound by the rules that federal law imposes on such entities. See Government Corporation Control Act, 31 U.S.C. §§ 9101-9109 ("GCCA"). That year, concerned that these and other restrictions were jeopardizing Amtrak's financial viability, Congress enacted the Reform Act in order to increase the railroad's managerial flexibility and improve its economic prospects. See S. Rep. No. 105-85, at 1 (1997) ("In order to achieve operating self-sufficiency, the bill is designed to enable Amtrak to increase efficiencies, reduce costs, and operate as much like a private business as possible."). To these ends, while Amtrak was provided with an influx of federal dollars -- appropriations totaling $5.2 billion over the 1998-2002 period -- Congress simultaneously sought to alter the railroad's legal status as a recipient of that money.

It did so in two ways that are significant for the present appeal. First, the Reform Act amended the GCCA to remove Amtrak from the list of mixed-ownership corporations. See Pub. L. No. 105-134, § 415(d)(2). This change freed the railroad from the requirements that bind companies so designated, such as the submission of budget reports to Congress, 31 U.S.C. § 9103, and annual government audits, 31 U.S.C. § 9105. Relatedly, the Act specifically amended 49 U.S.C. § 24301(a)(3) to provide that Amtrak "shall not be subject to title 31." See Pub. L. No. 105-134, § 415(d)(1). These amendments do not figure prominently in the legislative history of the Reform Act. Indeed, the only specific reference to this section

of the bill notes tersely that it "removes Amtrak from the Government Corporations Act." H.R. Rep. No. 105 251, at 34 (1997).

Certainly, neither the statutory text nor its history makes any mention of the False Claims Act. Yet, along with the rules regarding government corporations, that statute is housed in title 31. And the present case calls upon us to decide the extent to which this provision of the Reform Act narrowed the reach of the FCA as it relates to Amtrak. This is an issue of first impression.

The dispute giving rise to this case began when Amtrak contracted with two private companies, Bombardier Corporation and Envirovac, Inc. ("the Contractors"), to supply rail cars with new toilet systems for its trains. Bombardier makes the cars and Envirovac makes the toilets. Specifications for the toilet systems were incorporated into Amtrak's contracts with the Contractors. On March 16, 1998, Totten, a former Amtrak employee, filed a suit against the Contractors under the FCA, alleging that they had supplied unsuitable parts that did not meet the contractual specifications. Totten's complaint asserted that these noncompliant toilets were so defective that they endangered the health of Amtrak's passengers and employees. Totten further averred that the Contractors knew of these defects, yet delivered the cars anyway in order to obtain payment under their contracts.

In order to advance its purpose of protecting federal funds from fraud, the False Claims Act allows a private individual such as Totten (known as the relator) to

bring a qui tam action "in the name of the Government," and by that means to share in the ultimate recovery. See 31 U.S.C. § 3730(b); *see generally Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768-70 (2000). The statute's qui tam provision is a powerful tool that augments the government's limited enforcement resources by creating a strong financial incentive for private citizens to guard against efforts to defraud the public fisc. *See Yesudian*, 153 F.3d at 736. Indeed, an FCA plaintiff can realize a substantial recovery, as the statute imposes both treble damages and a civil penalty of up to $10,000 on any person who, inter alia, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1).

The language of § 3729(a)(1) suggests that the alleged false claim must have been presented to the federal government itself. Section 3729(c), however, defines "claim" quite broadly to include:

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Neither this court nor the Supreme Court has definitively explicated the complex relationship between the definition clause in § 3729(c) and the presentment clause in § 3729(a)(1). Instead, we have noted, but declined to answer, the question of whether an FCA plaintiff can prevail by proving only that a false claim was submitted to a federal grantee (such as Amtrak), as defined in subsection (c), without further demonstrating that the claim was submitted (or resubmitted) to the federal government, as suggested by the text of (a)(1). *See Yesudian*, 153 F.3d at 737-39.

The District Court did not face this question. Rather, the court relied on different grounds in rejecting Totten's complaint. See *United States ex rel. Totten v. Bombardier Corp.*, 139 F. Supp.2d 50, 52 & n.1 (D.D.C. 2001). First, the District Court held that, regardless of whether § 3729(a)(1) requires a showing that claims were presented to the United States itself, Totten's complaint failed because it did not allege that the Contractors presented "any request or demand ... for money or property" to Amtrak. Rather, the complaint merely asserts that defendants delivered goods to the railroad that did not meet the specifications of its contracts. Second, the District Court found that the complaint makes no representations regarding Amtrak's status as a recipient of federal money, either in general or in connection with the specific projects at issue in this case. Therefore, even if the Contractors had actually presented demands for payment to Amtrak, the complaint gives no indication as to how such demands would be "claim[s]" under the terms of subsection (c). Third, the District Court pointed out that Totten's

complaint does not state the time, place, and content of defendants' alleged false statements, as required by Rule 9(b). See Fed. R. Civ. P. 9(b) ("the circumstances constituting fraud or mistake shall be stated with particularity").

The District Court noted that ordinarily it would have allowed a plaintiff to cure such pleading flaws by amendment, but concluded that such a remedy would have been futile in Totten's case because his suit was doomed as a matter of law. *See Bombardier*, 139 F. Supp. 2d at 52 n.1. Specifically, the court held that Amtrak's special legal status rendered its contractors totally immune from liability under the FCA, regardless of how the case was pleaded. According to the District Court, the purpose of the Reform Act was to "negate the normal repercussions of government funding" as it related to Amtrak. *Id.* at 54. Among these repercussions is potential FCA liability for those entities receiving, through contracts with Amtrak, a share of the federal money invested in the railroad. The District Court thus held that the phrase "not subject to title 31" in 49 U.S.C.A. § 24301(a)(3) was intended to prevent "Amtrak's receipt of government funds from bringing Amtrak, and its business dealings, within the reach of the False Claims Act." *Id.* at 55.

Totten appeals from this decision. The United States elected not to intervene in this litigation pursuant to 31 U.S.C. § 3730(b)(5). However, the United States has now filed an *amicus curiae* brief on appellant's behalf arguing against the District Court's expansive construction of the Reform Act.

II. DISCUSSION

The central issue in this appeal is whether the Reform Act, in stating that Amtrak "shall not be subject to title 31," exempts those who contract with Amtrak from liability under the False Claims Act. We believe that it does not. Rejecting the District Court's construction of the Reform Act leads us to the question of whether Totten should be allowed to amend his complaint to correct its various shortcomings. We believe that he should.

A. The Meaning of "Subject To" in 49 U.S.C.A. § 24301(a)(3)

The argument that the Reform Act bars Totten's suit, which the District Court accepted and which the Contractors echo on appeal, runs as follows: The FCA confers benefits and imposes burdens on entities who receive government funding. The statute's stringent penalties deter fraud but they also may make some businesses reluctant to contract for fear of liability. Accordingly, if demands for payment presented to Amtrak can be considered "claims" within the meaning of 31 U.S.C. § 3729(c), the FCA would both protect and (indirectly) constrain Amtrak in its business transactions. And this would leave the railroad "subject to," in the sense of being "affected by," the terms of the statute. Under this scenario, Totten's cause of action is precluded by § 24301(a)(3).

We are not persuaded by this argument. We must begin, of course, with the text of the statute. As the

District Court itself recognized, the words "subject to" leave room for interpretation. *See Bombardier*, 139 F. Supp. 2d at 53. It is true that in some contexts "subject to" can mean "affected by," for example, "Boats in San Francisco Bay are often subject to fierce winds." However, when the phrase is used in situations more analogous to the one here, it is typically given a narrower cast: an entity is "subject to" a particular legal regime when it is regulated by, or made answerable under, that regime. See The Random House Thesaurus 696 (giving "bound by" as chief synonym for the phrase in the sentence, "We are subject to the laws of the country"); *see also, e.g.,. Texaco, Inc. v. DuhE*, 274 F.3d 911, 918-19 (5th Cir. 2001) (natural gas became "subject to an existing contract" within the meaning of the Natural Gas Policy Act when it was "governed by" the terms of that contract).

In *National Collegiate Athletic Association v. Smith*, for example, the Supreme Court considered whether "a private organization that does not receive federal financial assistance is subject to Title IX because it receives payment from entities that do." 525 U.S. 459, 465 (1999) (emphasis added). In holding that the NCAA was not subject to the statute, the Court did not preclude all applications of Title IX that indirectly affect the organization. Rather, the Smith decision mandated merely that the NCAA itself could not be sued under Title IX. *See Id.* at 470. The organization, in other words, was not required to conform its own conduct to the demands of the statute. That said, Title IX suits against the colleges or universities that fund the NCAA are plainly permitted after Smith, even though the effect of such litigation might be to limit the

number of schools willing to field athletic teams and thus to pay the Association's dues. *Cf. Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000) (holding that LSU was liable under Title IX for not adequately accommodating the school's female athletes). The fact that Title IX continues to have an indirect effect on the NCAA's business does not, in ordinary usage, render that organization "subject to" that statute.

Other examples reinforce this common understanding of the term. Thus, when the Supreme Court noted that a defendant was "subject to Title VII ... only if, at the time of the alleged retaliation, it met the statutory definition of employer," it clearly meant that the defendant could be held liable under Title VII only if that condition was met. *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 205 (1997); *see also, e.g., Nat'l Cable and Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 122 S. Ct. 782, 797 (2002) ("[T]he Commission has not determined whether Internet access via cable system facilities should be classified as a 'cable service' subject to Title VI of the Act, or as a 'telecommunications' or 'information service' subject to Title II.").

Moreover, this is how the phrase is used in the context of the False Claims Act itself. In its recent *Vermont Agency* decision, the Supreme Court used the phrase "subject to the false claims law" to describe the category of persons who can be sued under the FCA. 529 U.S. at 784 n.13; *see also, e.g., United States ex rel. Long v. SCS Bus. & Tech. Instit., Inc.*, 173 F.3d 870, 876 (D.C. Cir. 1999) (speaking of "individuals subject to the Act" as those who could be made liable under it);

United States ex rel. Zissler v. Regents of the Univ. of Minnesota, 154 F.3d 870, 872 (8th Cir. 1998) (asking whether States are "subject to the False Claims Act" in the sense of whether they can be held legally accountable for making false claims to the federal government).

Accordingly, where, as here, a plaintiff brings a qui tam action against a third party who has allegedly defrauded a federal grantee, common usage would suggest that the third party, and not the grantee, is being made "subject to" the FCA. We think this to be the more intuitive understanding of the Reform Act as well. Construing § 24301(a)(3) in this light would read it as preventing Amtrak from being directly regulated by the various provisions in title 31, for example, by being sued under the False Claims Act. In contrast, as long as Amtrak is not made to conform its actions to the terms imposed by such statutes, the railroad is not made "subject to" those laws. And, if this is the standard, it is clearly not met in the present case.

Here, Totten seeks to use the FCA not to regulate Amtrak, but instead to recover for the purported fraud of contractors hired to serve the railroad. Allowing the United States (or its relator) to obtain damages from those who contract with Amtrak imposes no direct legal obligation on the railroad. Nor does it permit Amtrak's conduct to be measured against the standards set in the statute. Even if similar suits may have an incidental effect on Amtrak's future business relationships, Totten's litigation will not compel the railroad to take any action in order to satisfy the demands of the FCA.

His action therefore does not implicate the Reform Act's "subject to" provision.

At any rate, this result flows from what we believe to be the most natural and ordinary reading of the phrase "subject to." Accordingly, we will accept that conclusion, and allow Totten's suit to go forward, unless we find evidence that Congress had a different meaning in mind when it drafted § 24301(a)(3). *See, e.g., Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We give the words of a statute their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import.") (quoting *Walters*, 519 U.S. at 207). The Contractors argue that such evidence is to be found in the legislative history of the Reform Act. Once again, we disagree.

If anything, the only specific reference that Congress made to the "not be subject to title 31" language suggests that this clause was intended to have a rather limited effect. The amendment appeared in Section 501 of the House version of the bill that became the Reform Act. That section, entitled "Financial Powers," was concerned mostly with restructuring Amtrak's stock. Subsection (e) contained both the clause removing Amtrak from the list of mixed-ownership Government corporations in 31 U.S.C. § 9101, and the clause adding the "subject to" language in 49 U.S.C. § 24301(a)(3). In its section-by-section analysis of the bill, the House Committee on Transportation and Infrastructure reported blandly that this subsection "removes Amtrak from the Government Corporations Act." *See* H.R. Rep. No. 105-251, at 34.

Insofar as this statement is useful, it clearly does not help the Contractors' cause. It provides no indication that Congress expected or intended that the phrase "subject to" would take on a broader agenda than its ordinary meaning connotes. To be sure, the language of the amended § 24301(a)(3) plainly does more than to remove Amtrak from the obligations of the GCCA, and must be construed accordingly. However, the Committee's narrow understanding of this change certainly reinforces our decision to reject the expansive interpretation adopted by the District Court. If anything, the legislative history's terse analysis indicates that no one in Congress imagined that the Reform Act would result in a repeal of the False Claims Act as it applies to any private company doing business with Amtrak.

Such an outcome would indeed have been striking. To accept it, we would have to believe that just as Congress was committing itself to a significant investment of federal money in Amtrak, it eliminated a weapon for protecting that money against fraud. We would have to believe that Congress placed a significant obstacle in the way of uprooting the unlawful depletion of that portion of the public fisc used to develop and support the nation's passenger rail system - the very system that the legislation in question was aimed at protecting.

As suggested above, the words that Congress wrote do not compel (and in their ordinary usage resist) this conclusion. And the scant extrinsic evidence that exists to cast light on the meaning of these words suggests that such a dramatic result was far from the legislative

mind. We think it not unreasonable to suppose that had such a broad rollback of the FCA in fact been the goal of the Reform Act, some indication of that intent would appear in the congressional record. *Cf. Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14 (1991). There is none. And, without some affirmative indicator, we are unwilling to place upon the text of that statute an expansive gloss that would generate this surprising result.

Recognizing the weakness of arguments from specific legislative history, the District Court, and now the Contractors, have focused on the broader purposes of the Reform Act as a possible interpretive guide. This effort falls flat as well. As described above, the District Court concluded that the aim of the Reform Act was to "negate the normal repercussions of government funding." *Totten*, 139 F. Supp. 2d at 54. That is, while Congress would continue (at least in the short-run) to appropriate significant federal money for Amtrak, its objective was to have the railroad treated as if it was receiving no such funding. The statute, in other words, legislated the pretense that Amtrak was self-sufficient. And, as such, FCA liability would be inappropriate, as that statute applies only where federal funds are at stake.

The problem with this view is that there is no actual basis for it in the legislative history. It is true that, in passing the Reform Act, Congress sought to end federal "micromanagement of Amtrak's operations," H.R. Rep. No. 105-251, at 13, in order to allow the railroad to "operate as much like a private business as possible," S. Rep. No. 105-85, at 1. However, even if we

accept these statements as relevant to determining the meaning of "subject to," they do not necessarily support the Contractors' position. In fact, they are entirely consistent with the position taken by Totten and the United States: that both the goal and effect of the Reform Act were to ensure that Amtrak would be treated just like any other private company that receives federal money. The Act, in other words, sought to ensure that Amtrak would no longer be subject to special restrictions that were not similarly imposed on private-sector transportation firms.

On this view, allowing Amtrak's contractors to be sued under the FCA makes perfect sense, as the contractors of any private business would likewise be subject to liability if they submitted false claims in connection with a project to be reimbursed with federal money. *See, e.g., United States v. Lagerbusch*, 361 F.2d 449 (3d Cir. 1966); *Murray & Sorenson, Inc. v. United States*, 207 F.2d 119, 123 (1st Cir. 1953) ("The fact that the claims in this case were not presented directly to the government, but were made to it indirectly through the contractors, does not prevent recovery under the False Claims Statute."); *cf. United States v. Bornstein*, 423 U.S. 303 (1976) (FCA used to sue a subcontractor whose fraud caused a private company that had contracted with the government to submit false invoices to the United States). Thus, contrary to the Contractors' contention, even the general goals expressed by the drafters of the Reform Act appear to support Totten's attempt to bring suit under the
FCA.

In sum, the most natural reading of 49 U.S.C.A. § 24301(a)(3) would not withdraw FCA protection against alleged false claims made by third parties on the extensive sums of federal money invested in Amtrak. Neither is this result mandated, or even suggested, by the scant legislative history of that provision, nor by the larger purposes and aims of the Reform Act as a whole. We therefore reverse the District Court's conclusion that § 24301(a)(3) erects a per se barrier preventing Totten from imposing FCA liability on the Contractors.

B. Allowing Totten to Amend his Complaint

1. Flaws In Totten's Unamended Complaint

This legal conclusion does not, however, mean that Totten's complaint, at least in its current form, actually states a valid claim under the False Claims Act. Indeed, as suggested above, there are several ways in which his present complaint is deficient. First, Totten has alleged merely that the Con-tractors "knowingly presented or caused to be presented equipment to an officer or employees of the National Railroad Passenger Corporation, that was knowingly substandard or noncompliant with engineering specifications for the Superliner II Contract to obtain payments from the National Railroad Passenger Corporation ..." Complaint, at p 22; *see also Id.* at pp 27, 57. However, the bare assertion that defendants delivered goods that did not conform to contractual specifications is not enough to state a violation of the FCA. Instead, in the sections relevant here, the statute

proscribes only false "claims" -- that is, actual demands for money or property, *see* 31 U.S.C. §§ 3729(a)(1), (a)(3); § 3729(c) -- and "false records or statements" used to induce such claims, *see* § 3729(a)(2). The FCA, in other words, "attaches liability, not to underlying fraudulent activity, but to the 'claim for payment.' " *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (quoting *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)). And, to date, Totten has simply made no allegation that the Contractors actually made false demands or submitted false records, whether to Amtrak or to anyone else.

The second problem with the present complaint is that Totten has provided no basis for concluding that, even if the defendants did present claims to Amtrak, those would be "claims" within the meaning of § 3729(c). This provision defines claim to include a request for payment made to:

> a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Thus, in order to satisfy Rule 12(b)(6), Totten would at least have to plead that the federal government provided some portion of the money requested by the Contractors, or that the government reimbursed Amtrak for what it paid out to improve the toilet

systems on its trains. Though he has not yet done so, it appears that Totten is aware of this requirement, and that he informed the District Court that he was prepared to amend his complaint to allege that federal money was implicated in the specific projects at issue. See Br. for the United States of America as Amicus Curiae Supporting Appellant 14.

A third difficulty with the complaint as it stands is that it does not appear to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. This rule requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Totten does not argue that his complaint satisfies this standard, but instead that the rule does not apply to him because he has not alleged that defendants made "fraudulent" claims, but merely "false" ones. He suggests that because false claims are actionable under the FCA even without "proof of specific intent to defraud," § 3729(b)(3), there is no "averment of fraud" within the meaning of Rule 9(b). We disagree.

Every circuit to consider the issue has held that, because the False Claims Act is self-evidently an anti-fraud statute, complaints brought under it must comply with Rule 9(b). *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995). Totten cites no authority whatsoever for the hairsplitting distinction he seeks to draw between fraudulent and false claims

under 9(b). And we can see no reason to recognize such a distinction.

The difference between the two categories of claims is simply the degree of scienter involved. *See United States v. TDC Mgmt. Corp.*, 24 F.3d 292, 297 (D.C. Cir. 1994) (distinction turns on "whether the defendant acted with an intent to deceive"). But this difference is entirely insignificant in the context of Rule 9(b)'s pleading requirements. Indeed, the rule specifically allows allegations of "intent, knowledge, and other condition of mind" to be averred generally. *See Gold*, 24 F.3d at 1477. In contrast, the "circumstances" that must be pleaded with specificity are matters such as the "time, place, and contents of the false representations," such representations being the element of fraud about which the rule is chiefly concerned. *See* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1297 (2d ed. 1990) (emphasis added). Therefore, in order to satisfy Rule 9(b), Totten must set forth an adequate factual basis for his allegations that the Contractors submitted false claims (or false statements in order to get false claims paid), including a more detailed description of the specific falsehoods that are the basis for his suit. *See Bly-Magee*, 236 F.3d at 1018-19; *Columbia/HCA*, 125 F.3d at 903.

2. Waiver of the Right to Amend

The Contractors argue that the flaws in the complaint are fatal, because Totten waived his right to amend his complaint by not seeking leave to do so pursuant to Rule 15(a). Instead, they point out, Totten merely indicated in his Opposition to defendants'

motion to dismiss that he stood ready to amend his complaint if the District Court identified any pleading deficiencies. As authority for their position, the Contractors cite *Government of Guam v. American President Lines*, 28 F.3d 142, 149-51 (D.C. Cir. 1994), in which we held that plaintiffs whose complaint had been dismissed (for lack of subject matter jurisdiction) had waived their right to amend by failing to make a Rule 15(a) motion, either before or after the District Court granted their opponent's dismissal motion.

The present case, however, is quite different. In President Lines, we denied plaintiffs an opportunity to amend only after upholding the trial court's decision to dismiss the complaint. In other words, that litigation was over unless we allowed the plaintiffs to reopen it, and we found that their interest in doing so did not outweigh the "general rules favoring the finality of judgments and the expeditious resolution of litigation." *Id.* at 151. Totten's situation presents no such countervailing finality concerns, in light of our conclusion that the District Court was wrong to dismiss the complaint on the only ground it actually gave for doing so. The waiver rule relied upon in President Lines is therefore not similarly applicable where the court of appeals reverses the trial court's dismissal order. *See The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 23 (1st Cir. 1989) (stating the general rule that where "the pleader has stood upon his pleading and appealed from a judgment of dismissal, amendment will not ordinarily be permitted ... if the order of dismissal is affirmed") (emphasis added) (quoting *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635-36 (1st Cir. 1988) (allowing amendment, even after

affirming dismissal, where it is "in the interest of justice")).

As for Totten's failure to seek leave to amend his complaint after the Contractors' Motion to Dismiss was granted, a factor on which President Lines relied in finding a waiver, *see* 28 F.3d at 151, the District Court made clear in the present case that such a request would have been futile. *See Bombardier*, 139 F. Supp.2d at 52 n.1 ("In other circumstances Totten would be permitted an opportunity to amend his complaint, but, as the remainder of this Opinion demonstrates, such an opportunity is not warranted in this case."). Given that the District Court expressly indicated that it would have allowed Totten to amend had it not viewed the Reform Act as posing an insurmountable obstacle to his suit -- regardless of how that suit was packaged -- we see no reason, having reversed the court's legal mistake, to forbid what would have been permitted in the absence of that error. Therefore, we will remand the case with instructions that Totten be granted leave to amend his complaint.

In so doing, however, we express no opinion on the question left open by this court's decision in *Yesudian*: whether an FCA plaintiff may prevail against a defendant who submits a false "claim" to a federal grantee (such as Amtrak), without presenting evidence that the claim was ever actually submitted to the U.S. government. *See* 153 F.3d at 737-39. Depending on how Totten crafts his amended complaint, this issue of statutory interpretation may be avoided altogether. We therefore leave it for another day.

III. CONCLUSION

For the reasons given above, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Randolph, Circuit Judge, concurring: I agree with all the court has written in its thorough opinion, but I believe a bit more is needed to highlight the problem we leave to the district court - namely, "whether [a False Claims Act] plaintiff can prevail by proving only that a false claim was submitted to a federal grantee (such as Amtrak), as defined in [31 U.S.C. § 3729(c)], without further demonstrating that the claim was submitted (or resubmitted) to the federal government, as suggested by the text of [31 U.S.C. § 3729(a)(1)]." Maj. op. at 6. Dicta in *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 737-39 (D.C. Cir. 1998), intimates that presenting a claim to any federal grantee is the equivalent to presenting a claim to the federal government. If the reasons given in *Yesudian* are all that can be said for this far-reaching conclusion, I would have much difficulty in accepting it.

Those liable under the False Claims Act include any person who "knowingly presents, or causes to be presented" - and here is the key language - "to an officer or employee of the United States government" a false claim. 31 U.S.C. § 3729(a)(1). Without more, this language would not seem to cover instances in which the false claim is presented to a federal grantee, at least

in instances when the grantee did not turn over the claim for reimbursement by the federal government. That may describe the alleged situation here, although we cannot be sure until the plaintiff amends his complaint. It is true that § 3729(c) defines "claim" to include claims submitted to federal grantees.* But it is equally true that no matter how "claim" is defined, subsection (a)(1) requires the alleged false claimant to present it (or cause it to be presented) to a federal officer or employee.

Two points, neither of which *Yesudian* highlighted, seem to me of critical importance in construing § 3729. The Attorney General is authorized to sue under the statute in the first instance, or to take over suits brought by private parties on behalf of the federal government (qui tam actions), or to allow the private party to prosecute the action on its own. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000). If a judgment is rendered against the defendant - and this is the first point - the award of damages is paid to the federal treasury (less a percentage if a private party initiated the action). The second point is that the Act authorizes treble damages plus a civil penalty. If the Act allows suits on claims presented to federal grantees but not

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* A "claim" includes any "request or demand ... for money ... made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

presented for payment to the federal government, these two features of the Act lead to a glaring incongruity. To illustrate, suppose the plaintiff in this case prevailed. The recovery would go to the plaintiff and the federal government. Amtrak would recover nothing. Yet the theory of plaintiff's case, as far as we can make out at the moment, is that Amtrak suffered the loss. Presumably, Amtrak would therefore be able to sue the defendants on its own and if its suit were as meritorious as the relator's, it too would recover damages. The effect would be a quadruple damage award - Amtrak's recovery plus the treble damages awarded under the False Claims Act.

This is the consequence of the construction suggested in *Yesudian* and, at the moment, it seems to me at odds with the structure of the Act. On the other hand, requiring that the United States have suffered losses by paying false claims presented to it by the federal grantee avoids this interpretative difficulty, remains faithful to the language of § 3729(a)(1) & (c) and is entirely consistent with the provision in the Act measuring damages not in terms of a grantee's losses, but by "the amount of damages which the Government sustains...." 31 U.S.C. § 3729(a). I hesitate to reach a firm conclusion, however, because we have not had sufficient briefing and argument on the issue and because it may turn out not to be an issue in the case when it is reformulated in the district court.